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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-24

In re Applications of

ROBERT M. PETERS (hereafter "Peters") — File No. BPH-880107MH

HUNTINGTON BROADCASTING CORPORATION (hereafter "HBC") — File No. BPH-880107MI

PREMIER BROADCASTING CO., INC. (hereafter "PBC") — File No. BPH-880107NJ

For Construction Permit
for a New FM Station in Churubusco, Indiana
on Channel 242A (96.3 MHz).

HEARING DESIGNATION ORDER

Adopted: January 19, 1990; Released: February 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *HBC*. HBC is the licensee of station WOWO(FM), Huntington, Indiana. The 70 dBu contours of WOWO(FM) and HBC's proposed facility would overlap in contravention of 47 C.F.R. § 73.3555 thus triggering, in this instance, a potential duopoly problem. HBC has indicated in its application, however, that it will divest itself of its interest in WOWO(FM) in the event of a grant of the referenced application. Accordingly, an appropriate condition will be specified below.

3. *HBC*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of its principals. HBC has not completed Item 4 correctly. HBC's application gives the corporate address of the applicant as the home address of Steven Price. Accordingly, HBC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *PBC*. In response to Section III, FCC Form 301, PBC indicated that it was not financially qualified to construct and operate the requested facilities for three months without revenue, but added that its financial proposal "[was] being formulated at [that] time." On March 28, 1988, PBC filed an untimely amendment certifying that it is now financially qualified. We note, however, that in the Commission's *Report and Order* in MM Docket No. 84-850, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. *See also* 47 C.F.R. § 73.3522(a)(6). That rule provides that predesignation amendments filed subsequent to the 30 day amendment period as of right will be considered only upon a showing of good cause. PBC has failed to provide any reason for its late-filed amendment. Therefore, its March 28, 1988 amendment, as it relates to the applicant's financial status, will be returned as untimely, and a financial qualifications issue will be specified below.[1]

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
PBC	March 28, 1989 (Ownership change)
Peters	June 29, 1988 (Engineering)

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to PBC, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of HMC's application, HBC will be ordered to divest itself of all interests in and sever all connections with Station WOWO(FM), Huntington, Indiana prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That HBC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That the financial portion of PBC's March 28, 1988 amendment IS HEREBY RETURNED. In addition, the petitions for leave to amend filed by PBC and Peters ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We note, however, that PBC has also included a minor change in ownership in its March 28, 1989 amendment. As to that part of the amendment, which seeks merely to apprise the Commission staff of an update to the applicant's ownership interests pursuant to 47 C.F.R. § 1.65, that portion will be accepted pursuant to paragraph 5 above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-28

In re Applications of

TRI COUNTY RADIO (hereafter "Tri County") File No. BPH-880114MP

POINT PLEASANT FM BROADCASTING LIMITED PARTNERSHIP (hereafter Point "Pleasant FM") File No. BPH-880114ND

POOLE RADIO, LTD. (hereafter "Poole") File No. BPH-880114NK

For Construction Permit
for a New FM Station on Channel 258A (99.5 MHz)
in Point Pleasant, West Virginia

HEARING DESIGNATION ORDER

Adopted: January 19, 1990; Released: February 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Tri County.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Tri County has not completed Item 4 correctly. Tri County's application gives a post office box number as the residence address for Vernon H. Baker. Accordingly, Tri County must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Tri County would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Tri County would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Tri County shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-8

In re Applications of

EVE ACKERMAN (hereafter "Ackerman")	File No. BPH-871123MA
CHARLEY C. WHITE AND GREGORY G. PERICH (hereafter "White")	File No. BPH-871124MC
WAYNE G. FIELDS AND GERALDINE Y. MILLER d/b/a L.L. BROADCASTING (hereafter "Broadcasting")	File No. BPH-871124ME
ALACHUA BROADCASTERS, INC. (hereafter "Alachua")	File No. BPH-871124MN
BRENT L. HARMON AND ELVIN L. HARMON d/b/a HARMON BROADCAST PARTNERS (hereafter "Harmon")	File No. BPH-871124MQ
LYNN T. RIVERS AND JAMES S. RIVERS III (hereafter "Rivers")	File No. BPH-871124MV
MINORITY MEDIA, INC. (hereafter "Media")	File No. BPH-871216ML (Previously Dismissed)

For Construction Permit
for a New FM Station on Channel 223A
in Alachua, Florida

HEARING DESIGNATION ORDER

Adopted: January 9, 1990; Released: February 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Alachua*. Alachua responded "no" to Section III, FCC Form 301 ("Financial Qualifications"), stating that "Arrangements are being prepared at this time for financial backing, once finalized we will make an amendment to the application." Accordingly, since no evidence has been produced indicating that Alachua has obtained the necessary financing, a financial issue will be specified.

3. *Media*. On February 12, 1988, Media filed a Petition for Waiver of Tenderability Defect Code ("Petition"), seeking reversal of the January 13, 1988 return of its application by the Chief, FM Branch. Media's application was found untenderable because it was filed after November 24, 1987, the close of the applicable window. *See* 47 C.F.R. § 73.3564(d) of the Rules.[1]

4. The Media Petition states it mailed its application to the Commission "before midnight 24 November 1987," and claims that, "the fact that the application was delayed by U.S. mail service and further by the Commission FM Branch Service should be lawful grounds for the Commission to waive the tenderability defect . . . " Media further asserts that "the statue (sic) provied (sic) by Congress on Minority Ownership of Broadcast Stations should superse (sic) and prevail over the Tenderability Defect Code cited by the FM Branch Chief (because) [it] was the sole Minority applicant for the proposed channel . . . " *Petition*, para. 7.[2]

5. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. §§ 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *affd. sub nom. Lorain Journal co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert den.* 383 U.S. 967 (1966); *Employment practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order* in Docket 84-750, 50 FR 19936 (1985), the only basis for reversing an earlier finding of untenderability is a demonstration that the Commission erred in its earlier determination. *See* specifically Appendix D to the *Report and Order*, *supra*.

6. We have examined the instant petition and have determined that the Commission did not make an error in returning the Media application as late-filed, and unacceptabe for tender. While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "we have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134, 134 n. 7 (1985). Moreover, concerning Media's minority status, Media has not demonstrated unusual or compelling circumstances to warrant favorable action, thus the request for waiver is hereby denied. *See, FCC Overrules Caldwell Television Associates, Ltd.*, FCC 85-534, Mimeo No. 36206, Released October 4, 1985. Accordingly, the Media petition will be denied.

7. Applicants have petitioned for leave to amend their applications on dates shown below. The accompanying amendments were filed after February 22, 1988 the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENT FILED
White	7/15/88
Alachua	10/20/88, 3/15/89, 9/21/89
Rivers	12/19/88

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Alachua whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the Media petition for reconsideration IS HEREBY DENIED.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by White, Alachua and Rivers ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Media's application was originally received by the Commission on November 27, 1987 but was returned by the Fee Section based on the nonsubmission of the fee with the application. The application was re-filed with the requisite filing fee on December 16, 1987.

[2] On May 15, 1989, Media filed an additional pleading, styled "Additional Information In Support of Petition for Waiver of Tenderability Defect Code." In this pleading, Media maintains the FCC Fee Section was the "direct cause" of its application being returned and becoming subsequently untimely. In support of this contention, Media states that its application "shouldn't have been returned . . . for payment of its FCC application fees, because as stated on page two (2) of the petitioner (sic) FCC 301 application, the petitioner is clearly stating that it is a not-for-profit corporation," and "the FCC rules waive the application fee . . . for FM applicants of a not-for-profit corporation." We reject Media's argument as immaterial because, as noted above, the application was submitted on November 27, 1987 after the close of the filing window, irrespective of the applicability of fees to Media's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-9

In re Applications of

CHARTCOM, INC.	File No. BPH-880125MP
KARAMMAT BROADCASTING, INC.	File No. BPH-880125MS
WALTER J. JAKUBOWSKI (hereafter "Jakubowski")	File No. BPH-880126OP

For Construction Permit
for a New FM Station on Channel 263A
in Warrensburg, New York

HEARING DESIGNATION ORDER

Adopted: January 9, 1990; Released: February 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Jakubowski has not completed Item 4 correctly. Jakubowski's application gives only a city and state as the residence address for Walter J. Jakubowski. Accordingly, Jakubowski must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That Jakubowski shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WAXY-FM)
Fort Lauderdale, Florida

MM Docket No. 84-1112
File No. BRH-781002WR

For Renewal of License

ADWAVE COMPANY
Fort Lauderdale, Florida

MM Docket No. 84-1113
File No. BPH-830510AL

SOUTH JERSEY RADIO, INC.
Fort Lauderdale, Florida

MM Docket No. 84-1114
File No. BPH-830511AK

COZZIN COMMUNICATIONS CORPORATION
Fort Lauderdale, Florida

MM Docket No. 84-1116
File No. BPH-830512AW

Rosemarie A. Reardon d/b/a LAUDERSEA BROADCASTING COMPANY
Fort Lauderdale, Florida

MM Docket No. 84-1118
File No. BPH-830512CP

For Construction Permit for a new FM Station

ORDER

Adopted: January 31, 1990; Released: February 13, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN:

1. On July 6, 1989, Adwave Company filed with the Review Board a Petition for Reconsideration of our *Decision*, 4 FCC Rcd 4679 (1989), in this proceeding, in which the Board majority affirmed the ALJ's disqualification of that applicant.

2. However, on August 11, 1989, the captioned parties submitted a proposed universal settlement agreement to the Commission. On January 11, 1990, the Commission adopted its *Memorandum Opinion and Order* approving that settlement agreement and terminating this hearing proceeding. *RKO General, Inc. (WAXY - FM)*, FCC 90-18 (adopted January 11, 1990). [1] In light thereof, we dismiss as moot Adwave's pending petition.

3. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Adwave Company on July 6, 1989, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] Also, by *Order*, FCC 90I-09 (released January 26, 1990), the Commission dismissed as moot the "Joint Motion for Stay of Proceedings Pending Before the Review Board," as filed by the parties on August 11, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For a Construction Permit
For a New Television Station
Fredericksburg, Texas

ERRATUM

Released: February 13, 1990

The Board's *Memorandum Opinion and Order*, FCC 90R-5, released January 26, 1990, dismissed Frontier Broadcasting, Inc.'s application for failure to prosecute based on Frontier's failure to file exceptions. Because our action was based on an erroneous fact, *i.e.*, Frontier did file exceptions, the *Memorandum Opinion and Order*, *supra* is corrected as follows:

Paragraph 1, line 5, the sentence should read: Exceptions were filed by Global Information Technologies, Inc., TexStar Communications, Ltd. (TexStar), Frontier Broadcasting, Inc., Fredericksburg Channel 2, and Hal S. Widsten.

Paragraph 1, line 9, delete the final sentence of the paragraph beginning with the words: "Frontier Broadcasting, Inc. failed to file exceptions"

Paragraph 10, delete the paragraph in its entirety.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-323

In the Matter of

Cincinnati Bell Telephone Company — Transmittal No. 518

Revisions to Tariff FCC No. 35

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1990; Released: January 25, 1990

By the Commission:

I. INTRODUCTION

1. By this Order, we conclude our investigation of Cincinnati Bell Telephone Company (CBT) Transmittal No. 518, and its calling card validation practices which underlie the payphone presubscription proposed in Transmittal No. 518. For the reasons discussed below, we conclude that CBT's calling card practices are unreasonably discriminatory, and undermine the presubscription plan established in the tariff. We therefore conclude that the tariff is unlawful in violation of the Communications Act of 1934. We direct CBT to cease and desist the initiation of the balloting plan described in Transmittal No. 518.

II. BACKGROUND

A. Tariff Filing; Pleadings

2. CBT filed Transmittal No. 518 on March 17, 1989, to implement payphone presubscription and preselection for its public and semi-public pay telephones. According to CBT, these procedures would allow the owner (or its agent) of the premises where CBT provides public or semi-public service[1] to select a primary interexchange carrier (PIC) to transport interLATA calls from the public or semi-public telephones located on its premises without dialing a 10XXX access code.[2] CBT Description and Justification, at 1. These tariff provisions were challenged by US Sprint Communications Company Limited Partnership (Sprint) in a petition to reject, or alternatively, suspend and investigate. Sprint argued that CBT's proposed presubscription process was unreasonable and unjustly discriminatory.

3. Sprint alleged that the balloting procedure described in the tariff would result in a highly biased election because CBT's current practices relating to the issuance and validation of credit cards would give AT&T an undue advantage in such balloting. CBT does not issue calling cards in its own name, although it processes customer orders for such cards on behalf of AT&T. [3] According to Sprint, CBT furnishes AT&T with the data necessary to validate a caller's use of these cards, but refuses to supply the same data to any interexchange carrier (IC) other than AT&T. Consequently, only AT&T can honor the calling cards issued for AT&T by CBT, and handle traffic using that credit card from CBT payphones. Sprint Petition at 2.

4. Premises owners participating in presubscription balloting are partially motivated in their selection of a PIC by the amount of commissions a carrier can promise to pay, which, in turn, is based on the volume of calls handled by the carrier. Sprint contended that AT&T's unique ability to accept AT&T calling card calls, fostered by CBT's refusal to provide validation data to ICs other than AT&T, enables AT&T to promise payphone premises owners commissions on a higher base of traffic than any other IC seeking to compete in the election process in question, leaving no incentive for an owner to choose a carrier other than AT&T.

5. In opposition, CBT argued that CBT could not release this validation data to ICs other than AT&T because, pursuant to an agreement between CBT and AT&T in which CBT acts as billing and collection agent for AT&T, this data is proprietary to AT&T. However, CBT offered to enter into a similar agreement to provide validation service to Sprint when callers use Sprint's credit card. CBT also argued that comparable validation data are available to other ICs from alternative sources.

B. Suspension Order; Investigation

6. On June 14, 1989, the Common Carrier Bureau (the Bureau) released an Order suspending Transmittal No. 518 for the maximum period of five months.[4] On July 19, 1989, the Bureau released an Order designating issues for investigation.[5] The Bureau concluded that CBT's decision to conduct payphone presubscription balloting under these circumstances presented substantial Communications Act questions. Accordingly, the Bureau designated for investigation issues regarding the efficacy of CBT's presubscription process, and, more broadly, whether CBT possesses data which must be made available to other ICs in addition to AT&T.

7. As directed, CBT filed its direct case on August 23, 1989. Oppositions were filed on September 7, 1989, by Sprint, MCI Communications Corporation (MCI), Nycom Information Services (Nycom), the Competitive Telecommunications Association (CompTel), the Operator Service Providers of America (OSPA), National Telephone Services, Inc. (NTS), and the Operator Service Network (OSN).[6] Comments were filed by AT&T and International Telecharge, Inc. (ITI) on September 7, 1989. CBT filed its rebuttal on September 14, 1989, and Sprint filed a response to AT&T's comments on that same date.

III. PLEADINGS

A. CBT Direct Case

8. By way of background, CBT states that prior to divestiture, AT&T provided many services to the BOCs and other affiliated companies such as CBT pursuant to longstanding license and supply contracts. Upon divestiture, CBT asserts, the Modification of Final Judgment (MFJ) required AT&T to terminate these contracts with the divested BOCs along with affiliates such as CBT. CBT maintains that since such unilateral termination of CBT's contract rights would have been without reasonable compensation, AT&T's Plan of Reorganization provided

for the execution of agreements which provide value to CBT to compensate for that which was formerly received under the license and supply contracts. According to CBT, one of these agreements contains provisions for CBT to perform billing and collection functions for AT&T and to act as agent for AT&T in issuing AT&T calling cards and updating AT&T Billing Validation Application (BVA) database. However, CBT insists that this agreement does not require that CBT provide these types of services exclusively to AT&T. Rather, CBT contends that it is free to enter into similar agreements with other ICs and would do so if an IC requested. CBT Direct Case at 3-5.

9. CBT's responses to the specific questions in the *Designation Order* indicate that CBT provides two categories of validation information to AT&T: AT&T calling card information, and CBT telephone number information. *Id.* at 5-6. AT&T calling card information consists of a 14-digit number which contains the customer's 10-digit telephone line number or a 10-digit Revenue Accounting Office (RAO) number, and the customer's 4-digit Personal Identification Number (PIN). CBT telephone number information consists of CBT's public payphone numbers and the telephone numbers of CBT customers who will not accept third party charged calls. *Id.* at 6.

10. According to CBT, these two categories comprise the validation data which CBT provides to AT&T and which would be useful for Sprint (and, presumably, other ICs) to validate a customer's use of an AT&T calling card on a public payphone presubscribed to Sprint. *Id.* at 5-6. Further, in response to Question 2(a) in the *Designation Order*, CBT states that the 14-digit account number is currently used (by AT&T, not CBT) to validate calls using AT&T calling cards and originating from public payphones in CBT territory. *Id.* at 9, 19. In response to Questions 3(e) and 3(f), CBT states that the 14 digit telephone line or RAO-based number would also be necessary to enable Sprint to validate AT&T calling cards on public payphones presubscribed to Sprint, while CBT telephone number information would not be useful for this purpose. *Id.* at 6, 16.

11. In its direct case, CBT states that CBT telephone number information alone -- CBT payphone numbers and numbers of CBT customers who would not accept third party charged calls -- would be provided through US West Service Link, Inc., but that in order for Sprint to *validate* an AT&T credit card call originating from a payphone presubscribed to Sprint, the 14-digit line or RAO-based number (inclusive of the 4-digit PIN) would be necessary. CBT Direct Case at 16. CBT contends that the 14-digit line or RAO-based numbers are obtained by CBT as billing agent for AT&T and CBT insists that the "unique combination" of the line or RAO-based account number *plus* the PIN is proprietary to AT&T and, therefore, cannot be provided to other ICs. *Id.* at 7, 15.

12. CBT provides the necessary data to AT&T via use of its Data Base Administration System (DBAS). DBAS is essentially a data base owned and operated by CBT in Cincinnati. When CBT processes an order for an AT&T calling card, it assigns a calling card number to the customer and stores all relevant information in DBAS. On a nightly basis, CBT updates and transfers to AT&T's BVA the information in DBAS apparently on the basis of information it receives in the course of providing local exchange service.

13. CBT stated that it is willing to enter into a contract with Sprint and any other interested IC to make available the same type of calling card services it provides to AT&T.[8] In its direct case, CBT indicates that in this instance, both categories of information would also be provided to any IC, with the exception that a special universal service code would need to be established in order to distinguish one carrier's account from another. CBT did not provide any specific information concerning the cost of this service other than CBT's statement that such service to Sprint (or other ICs) would be "proportionately equal to the cost charged to AT&T."

B. Oppositions and Comments

14. With the exception of AT&T, all parties that filed oppositions or comments agree that CBT's practice of furnishing AT&T, but not other ICs, with validation data is unreasonably discriminatory. Further, Nycom for example, states that as long as AT&T remains the only operator service provider for whom all local exchange carriers (LECs) bill and collect and provide validation data, AT&T will enjoy a preferential position based not upon the superior quality and competitiveness of its service, but because its historical relationship with the local carriers, including CBT, allows it to be the only operator service provider capable of offering universal completion of 0+ calls. Nycom Opposition at 11-12.

15. These parties dispute CBT and AT&T's claim that the validation data belong to AT&T pursuant to the CBT/AT&T agreement, primarily arguing that such data are gathered essentially as part of CBT's function as a LEC rather than as agent for AT&T. In support of this contention, Sprint argues that the numbers which comprise the validation data are assigned by CBT using numbers administered by CBT as part of the North American Numbering Plan, while the last four digits (the PIN) are randomly generated by CBT Information Systems. Thus, Sprint concludes, this information is the product of CBT's LEC franchise and should be shared with all of the ICs. Sprint Opposition at 11. Similarly, the Opponents state that since every aspect of the creation of the calling card number takes place at the LEC level, when AT&T issues a card to a CBT customer, it has not created anything which reasonably could be deemed its property; it has merely associated its name with the customer's line or RAO billing number. Joint Opposition at 7-8, 13.

16. This position is echoed in Nycom's opposition which asserts that the functions CBT performs as billing agent for AT&T are identical to the ones performed by any other LEC issuing its own calling cards and are not sufficiently unique to support a claim of AT&T proprietorship. Nycom Opposition at 5. Additionally, Nycom contends that CBT controls the files containing valid calling card numbers and PINS because CBT processes the customer service order which establishes the Customer Record Information System file (CRIS) containing the calling card information. *Id.* at 6.

17. Moreover, Sprint asserts that Section 1.3.1 of an agreement between AT&T and CBT dated December 22, 1983, provides that information furnished by one party to the other is the property of the disclosing party. Sprint argues that since the calling card numbers are generated by CBT and given to AT&T (citing CBT's response to Question 1(b) at 7, and Section 6.16.2 of the above-mentioned agreement) CBT "clearly" is the disclosing party under its agreement with AT&T. Thus, Sprint con-

tends, the validation information here at issue is the property of CBT, not AT&T. Sprint Comments & Opposition at 9.

18. MCI and Nycom contend that CBT's provision of calling cards is not significantly different from the BOC practices that were addressed in *United States v. Western Electric Co.*, 698 F.Supp. 348 (D.D.C. 1988) (*Calling Card Order*), which required each BOC to make available on an unbundled basis, to all ICs that request it, the same calling card validation data that the BOC provides to AT&T. MCI Opposition at 3-4, Appendix at 2. In addition, MCI asserts that CBT bills the end user under CBT's own name for intraLATA usage of the AT&T card, thereby establishing that for such use, the card is a CBT card. MCI concludes that CBT's role in issuing the card and the use of that card for intraLATA toll calls confirm these cards equivalence to the BOC calling cards at issue in the *Calling Card Order*, and thus require the same IC access to validation data. MCI Opposition at 11; *see* Nycom Opposition at 7.

19. These parties likewise discount CBT's offer to act as agent for AT&T's competitors and provide those ICs with the same validation services CBT provides to AT&T. Many argue that such arrangements would not negate the advantage AT&T would have in the balloting process due to AT&T's embedded base of card customers stemming from AT&T's longstanding partnership with CBT. Sprint Comments & Opposition at 7. *See also* Joint Opposition at 16; ITI Comments at 14. In addition, MCI argues that CBT's offer would not solve the problem of how to provide a non-dominant IC with the information necessary to validate a LEC-issued calling card when a customer attempts to use that card to place a call over an IC's network from a phone that is presubscribed to another carrier. MCI Opposition at 12 n.20. Furthermore, notwithstanding CBT's offer, AT&T's current base of cards would still remain unavailable for validation by other ICs. Joint Opposition at 26.

20. Moreover, as a practical matter, these parties argue that CBT's offer fails as a viable alternative because only one IC may issue a 14-digit calling card using any particular line number. According to the Opponents, this is because the 14-digit card number system only allows two PINs to be issued per line number, one of which is used only when the customer takes the optional services restricting usage (*e. g.*, "call home only" status). *Id.* at 8-9, 18; *see* ITI Comments at 14. Thus, the Opponents argue, the cards which CBT would issue as agent for AT&T's competitors would not be the 14-digit telephone line number card most appealing to consumers but, as stated in CBT's direct case, would involve a unique numbering sequence. Therefore, between the alleged built-in limitation in the system, and CBT's offer to issue calling cards for AT&T's competitors that would have a "special universal service order code" for each IC, the Opponents argue that AT&T would be the only IC for which CBT could issue telephone line-based calling cards. Thus, only AT&T's customers would have the convenience of memory provided by such cards, while all other ICs would have to issue cards based on a set of numbers unfamiliar to the customer and therefore inconvenient to remember. This is further complicated by the Opponents' contention that there is not a sufficient number of alternative RAO codes to accommodate all carriers. Joint Opposition at 18.

21. Favoring the ability of an IC to issue its own proprietary calling card, both Sprint and MCI state that they would oppose the imposition of a general requirement upon ICs to exchange validation data.[9] Sprint says that it is in the process of developing a number of valuable service features that can be used in connection with Sprint's calling cards, which could only be used by customers whose card gave them access to Sprint's network. Thus, Sprint argues, allowing other ICs to accept Sprint's calling cards would confuse customers, since other carriers would only be able to handle ordinary calls but not the advanced features Sprint is in the process of developing. Sprint also contends that acceptance of calls by other ICs would result in multiple bills from multiple carriers for calls charged to a single Sprint card, further adding to confusion and destroying Sprint's efforts to build a close identity with its customer base. Sprint Comments and Opposition at 16. Moreover, Sprint maintains, if each IC's card were universally accepted by other ICs, no IC would find it worthwhile to develop features that the customer would only be able to use on those occasions when he or she was connected with the IC of his or her choice, thus stifling technological improvements that could benefit customers.

22. Sprint contends that the payphone presubscription balloting process would be fair only if CBT issued cards on behalf of other ICs to all existing calling card holders in CBT's customer base, thereby neutralizing CBT's embedded base. *Id.* at 7. The Opponents urge this Commission to order CBT to send new cards in its own name to all current holders of cards issued by CBT as AT&T's agent, which would be validated and billed for all ICs equally. These cards would have the same line number and PIN as the existing AT&T cards, and would thus be indistinguishable from them. The Opponents predict that this procedure would make all AT&T cards previously issued by CBT available for validation and billing by all ICs. Joint Opposition at 21.

23. The Opponents also request that this Commission abrogate portions of the CBT/AT&T agreement which purport to give AT&T exclusive or proprietary rights over certain data and order CBT to provide validation information to all ICs. *Id.* at 23. According to the Opponents, issuance of CBT cards or abrogation of AT&T's claim to proprietary rights will serve to "level the playing field" in the calling card marketplace. The Opponents favor the latter proposal because abrogation could remedy the problem immediately and without delay, expense, or a requirement that CBT provide a service it says it does not wish to provide. *Id.* at 24.

24. Nycom urges this Commission to exercise our jurisdiction under Section 211 of the Act and direct CBT to file copies of its contracts with AT&T governing the assignment of calling card account (both RAO and NXX) and PIN numbers for AT&T cards issued in CBT territory as well as nationwide. Nycom believes that this course of action will allow us to determine the precise parameters of the AT&T/CBT business relationship, abrogate any contract provisions which purport to give AT&T an exclusive right to or proprietary interest in CBT assigned calling card information in violation of Sections 201 and 202 of the Act, and ensure that the validation data provided to the industry are a complete and correct representation of the data actually made available by CBT for use of AT&T and other LECs. Nycom Opposition at 1-2.

C. CBT Rebuttal; AT & T Comments

25. CBT maintains that it does not access AT&T's validation system and that AT&T actually validates the calling cards in question, whether used for interLATA or intraLATA purposes. According to CBT, intraLATA calls made with calling cards are validated by AT&T under contract with CBT. Since AT&T issues and validates calling cards, CBT asserts, these cards are the property of AT&T, not CBT. CBT Rebuttal at 3.

26. CBT specifically disputes the contention that only one interexchange carrier PIN can be assigned to a LEC customer's telephone number, arguing that it knows of no reason which would prevent it from issuing unique calling cards for other ICs for use in interLATA calling, the first 10 digits of which are the customer's telephone number. CBT asserts that for any IC, calling card numbers could be generated using the customer's telephone number followed by a PIN, but that one carrier's accounts would be distinguished from another's by use of Universal Service Order Codes in the customer record system (not the validation process) which would be transparent from the customer's standpoint. *Id.* at 4-5.

27. AT&T asserts that it has arranged for CBT to assign calling card numbers to AT&T customers in CBT territory, using the numbering format prescribed by AT&T, and to update AT&T's validation database with changes or additions to those numbers. AT&T insists that CBT does not validate calls placed with an AT&T card. Rather, AT&T contends, the validation process itself (the BVA system) is owned and operated by AT&T. AT&T Comments at 3 & n.*.

28. AT&T asserts that its arrangements with CBT are no different from those that could be made by any or all of AT&T's competitors, if they so chose. Thus, AT&T contends, AT&T's contractual relationship with CBT confers on AT&T no special benefit that cannot be obtained by other carriers. For this reason, AT&T argues, there is no legitimate basis for nullifying AT&T's proprietary rights in its own calling card service, or for mandating that AT&T make its cards available for use by competing carriers. *Id.* at 4.

29. Although AT&T maintains that it has a proprietary interest in the validation data in question, AT&T offers to authorize CBT to release to other ICs the validation data concerning telephone line-number based calling cards,[10] provided such authorization resolves the issues raised in this investigation. *Id.* at 6. RAO-based numbers and CBT telephone number data are not included in this AT&T proposal.

IV. DISCUSSION

30. Our investigation has disclosed that, for a fee, CBT receives and processes the customer orders for AT&T calling cards, assigns the calling card numbers, and sends this information to the Data Base Administration System (DBAS), a data base which is owned, operated, and maintained by CBT, and located on its premises in Cincinnati. CBT updates the DBAS on a continuous basis with information apparently ascertained in the course of providing local telephone service to its customers. On a nightly basis, CBT transfers the customer record information in the DBAS over dedicated lines to AT&T's Billing Validation System (BVA). The BVA, located in Denver, Colorado, is owned, operated, and maintained by AT&T, and is the data base AT&T consults via its signalling network to validate on a call-by-call basis credit cards issued in Cincinnati. Using the customer records generated by CBT's DBAS and transferred to AT&T's BVA, AT&T prints and mails the calling card, which bears an AT&T logo.

31. AT&T's BVA is connected to AT&T's Common Channel Signaling (CCS) network, the long distance telephone signaling network. An inquiry as to the validity of a calling card is routed through AT&T's CCS by AT&T switches to the appropriate BVA according to the numbering sequence of the calling card. The BVA, located in Denver, which is used in validation of calls in CBT's service area, is one of many BVAs in AT&T's system. These BVAs do not "analyze" or otherwise substantively confirm or authorize calling card numbers. After comparing the inquiry with the information contained in the BVA, the BVA simply sends a signal indicating whether the calling card number matches the number loaded by CBT's DBAS.

32. Thus, for purposes of validation, there appears to be little difference between the data stored in CBT's DBAS and AT&T's BVA. Customer record information concerning the calling card is collected, administered, and maintained by CBT, while AT&T facilities and personnel route calling card inquiries to the BVA, which forwards a signal indicating whether further processing should be performed. The 14-digit line or RAO-based number consists of three digits which CBT does not originate,[11] followed by seven digits which are originated by CBT, followed by four digits (the PIN) which are supplied at random by CBT through Cincinnati Bell Information Systems or as requested by the customer. CBT Direct Case at 7.

33. CBT's role in the issuance and validation of the credit cards that AT&T uses encompasses some activities that are a byproduct of local exchange operations, *e.g.*, CBT's generation of calling cards that incorporate the customer's telephone number. CBT's interstate services to AT&T that are a byproduct of local exchange operations are Title II services for purposes of the Communications Act. Title II services that a carrier provides to another carrier must be offered to all other carriers who could utilize such services in a manner that does not create unreasonable discrimination in the provision of like services. Failure to do so violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

34. Although CBT has offered some credit card related services to carriers other than AT&T through US West Service Link, Inc. and CBT has stated that it is willing and able to provide other services to ICs, CBT has not demonstrated that the services that CBT is providing or would be willing to provide are being offered to all ICs at the same or similar rates, terms or conditions. The CBT-AT&T contract bundles services that are clearly Title II services, services that may or may not be Title II services, and services that are outside the scope of Title II in a manner that apparently makes it impossible to ascertain the rate for the Title II services CBT provides to AT&T.[12] Thus, CBT's current contractual arrangement with AT&T would make it impossible for CBT to fulfill its statutory obligation.

35. We conclude that it would be an unreasonable practice to conduct payphone presubscription balloting before CBT restructures its credit card related services to achieve compliance with CBT's Section 202(a) obligations. Accordingly, we conclude that Transmittal No. 518 is unlawful because the premature payphone

presubscription process described in that transmittal is an unreasonable practice for purposes of Section 201(b) of the Act, 47 U.S.C. § 201(b).

36. The record in this proceeding does not enable us to establish a definitive list of the credit card related services and data that CBT must offer to all ICs on a nondiscriminatory basis.[13] All parties to this investigation apparently agree that CBT should offer most credit card related services to ICs that CBT provides to AT&T, including use of the 10-digit telephone number in a credit card. CBT contends, however, that it has no right or obligation to make available to other ICs the complete 14-digit line number based and RAO numbers used by AT&T. Other ICs that filed oppositions or comments contend that CBT is obligated to make those numbers available to other ICs.[14]

37. We conclude that we should determine the exact nature of CBT's activities and obligations with respect to the 14-digit RAO numbers and the 4-digit PIN in this docket, and that such a determination requires additional information and analysis from the parties. We are accordingly directing CBT and inviting all other parties to file supplemental pleadings to explain why CBT's role in the development and use of the 14-digit RAO number and/or the 4-digit PIN is or is not a Title II activity that is subject to the Section 202(a) requirement that CBT not discriminate unreasonably between AT&T and the ICs. CBT shall file its supplemental brief on or before February 23, 1990. If AT&T chooses to file a supplemental brief on this issue, the AT&T brief shall also be filed on or before February 23, 1990. Supplemental briefs of other parties shall be filed on or before March 16, 1990. Any CBT or AT&T reply to such briefs shall be filed on or before April 6, 1990.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, that Cincinnati Bell Telephone Transmittal No. 518 IS FOUND UNLAWFUL in violation of 47 U.S.C. Sections 201(b) and 202(a), 47 C.F.R. §§ 201(b), 202(a).

39. IT IS FURTHER ORDERED that Cincinnati Bell Telephone shall cease and desist from the initiation of the payphone balloting plan proposed in Transmittal 518.

40. IT IS FURTHER ORDERED that Cincinnati Bell Telephone SHALL ISSUE revisions to their tariffs no later than January 31, 1990, removing the unlawful material. These revisions shall be scheduled to become effective on not less than one day's notice.

41. IT IS FURTHER ORDERED that Special Permission No. 90-64 IS ASSIGNED and Sections 61.58, 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purpose of issuing the above revisions.

42. IT IS FURTHER ORDERED that Cincinnati Bell Telephone and American Telephone and Telegraph Company (AT&T) shall comply with the filing requirements described in paragraph 37, *supra*.

43. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These revisions would not apply to customer-owned, coin-operated telephones (COCOTs).

[2] The use of a 10XXX access code permits the caller rather than the owner to select an interexchange carrier (IC) on a call-by-call basis.

[3] CBT says that CBT operates in a single LATA territory with a large toll-free calling area, and that the amount of intraLATA toll calls within the CBT territory is so small that it does not justify the expense of issuing, maintaining, and accounting for calling cards. CBT Reply (Apr. 13, 1989) at 3.

[4] Cincinnati Bell Telephone, Transmittal No. 518, 4 FCC Rcd 5033 (1989).

[5] Cincinnati Bell Telephone, Transmittal No. 518, CC Docket No. 89-323, 4 FCC Rcd 5735 (1989) (*Designation Order*).

[6] CompTel, OSPA, NTS, and OSN (hereinafter referred to as "Opponents") filed a joint opposition.

[7] CBT says that the CBT telephone number data which will be made available through US West Service Link, Inc., is more accurately described as "screening" data rather than "validation" data, because this information is used to screen individual calls charged to telephone numbers that cannot legitimately be charged. CBT Direct Case at 12. Although screening data are a desirable component of validation (because these data identify numbers with billing restrictions), unlike the 14-digit combination line or RAO-based telephone number and PIN, the CBT telephone number data will not provide affirmative information indicating that a caller is using a valid card number.

[8] As agent for AT&T, CBT asserts that, for a fee, it processes orders for AT&T's card; that is, CBT takes the order and assigns a number to each card, mechanically generates the customer numbers for AT&T cards and PINs, transmits the information to AT&T for card issuance (AT&T prints and then mails the cards) and transmits basic data to AT&T's BVA for card validation. CBT also bills and collects payments from AT&T customers for credit card calls. CBT Reply at 4; CBT Rebuttal at 3.

[9] Sprint argues that the data used for validation should be released in this instance because the data are obtained as a result of CBT's LEC activities, and thus are not the property of AT&T, but CBT.

[10] Line-number based calling cards are those cards bearing the customer's 10-digit telephone number, plus the 4-digit PIN. AT&T Comments at 5 n.*.

[11] The three digit area code in line-based numbers is derived from the North American Numbering Plan; the first three digits in RAO-based numbers are allocated to CBT by Bellcore. CBT Direct Case at 7.

[12] CBT Direct Case at 10-11.

[13] Such credit card related services do not include exchange carrier preparation or mailing of customer bills for IC services that were charged to a credit card or exchange carrier collection of amounts billed for IC services. *See Detariffing of Billing and Collection Services* (Docket No. 85-88) 102 FCC 2d 1150 (1986).

[14] *See e.g.*, note 9 and accompanying text.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-221

In the Matter of

Amendment of Section 73.202(b), RM-6177
Table of Allotments,
FM Broadcast Stations.
(Fort Valley and Wrightsville,
Georgia)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 29, 1989; Released: February 8, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the contingent petition for reconsideration, filed September 27, 1989, by Kirby Broadcasting Company ("Kirby"), licensee of Station WKKZ(FM), Dublin, Georgia, seeking reconsideration of the *Report and Order*, 4 FCC Rcd 6467 (1989), which granted Fox Valley Broadcasting Corporation's request to substitute Channel 292C2 for Channel 292A at Fort Valley, Georgia, and modify the license of Station WQBZ(FM) to specify operation on the higher powered channel. On December 18, 1989, Kirby requested that its contingent petition for reconsideration be dismissed.

2. Accordingly, pursuant to the authority contained in Section 0.283 of the Commission's Rules, Kirby's contingent petition for reconsideration is HEREBY DISMISSED.

3. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. No. 12	Transmittal Nos. 1935, 1939, 1955, 1974, 1975, 1976, 1987, and 1988

Custom-Designed Integrated Services

ORDER

Adopted: February 2, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

1. This Order considers petitions opposing several transmittals in which AT&T revises its Tariff F.C.C. No. 12, Custom-Designed Integrated Services. The effective dates for these transmittals coincide. The captioned transmittals either establish new Virtual Telecommunications Network Service (VTNS) options under Section 7 of that tariff, or alter existing VTNS arrangements. Williams Telecommunications Group, Inc. (Williams) and US Sprint Communications Company Limited Partnership (Sprint) oppose these revisions. In the paragraphs below we summarize the Transmittals and the petitions against them.

Transmittal 1935

2. AT&T Communications (AT&T) Transmittal No. 1935, filed November 29, 1989 and scheduled to become effective February 4, 1990, on 67 days' notice revises VTNS Option 4. A petition to reject was filed December 14, 1989 by Williams Telecommunications Group (Williams), and AT&T filed its reply December 21, 1989.

3. By this transmittal, AT&T modifies VTNS Option 4 in several respects. The revisions add rate schedules for calling capabilities to Canada, Mexico, and international locations; expand authorization code calling; alter charges for changes in 1.5 Mbps Data Transmission Capabilities (DTCs); and add such change charges for two types of ports.

4. Williams asserts that modifications to the original VTNS arrangement impeach AT&T's original projections, and that such modifications of existing options harm the public interest. Williams Petition at 12-14. Williams also contends that AT&T has not provided underlying data to justify its cost support material. *Id.* at 15-16. AT&T replies that it applied the same methodology to demonstrate that revised Option 4 will be fully compensatory as was used in the initial filing, so that no inconsistency arises, and contends that the cost support material provided is comparable to that supplied in each prior Tariff 12 filing. AT&T Reply at 5-6. AT&T adds that limiting its ability to adjust such arrangements to reflect competitive considerations, as Williams urges, would harm the public interest by unnecessarily reducing the contribution of VTNS to the recovery of AT&T's fixed costs. *Id.* at 6.

Transmittal 1939

5. AT&T filed revisions to VTNS Option 9 under Transmittal 1939 on December 1, 1989. Williams filed a petition jointly against these revisions and AT&T filed its reply December 29, 1989.

6. The Transmittal 1939 revisions to VTNS Option 9 entail the substitution of Voice Transmission Capabilities (VTCs) for existing low-speed Data Transmission Capabilities (DTCs), a corresponding reduction in basic and minimum annual charges, and the addition of volume discounts for VTCs and DTCs. AT&T argues that these revisions are necessary to encourage greater use under Option 9, but states that, absent the revisions, the customer would still satisfy its needs under VTNS. Transmittal 1939 Description and Justification at 3-4, 7.

7. Williams challenges Transmittal 1939 as inherently conflicting with the original VTNS Option 9 filing made less than six months earlier. It asserts that different extended terms are permissible, but argues that short-term modifications such as AT&T would establish for Option 9 are "wholly inconsistent" with the extended-term premise of the Tariff 12 context. Williams Petition at 15-16. AT&T replies that its revisions are based on the same methodology, filing practices and cost systems as the original Option 9 filing, and similarly demonstrate the option will be fully compensatory even at minimum demand levels. AT&T Reply at 5-6. If it were limited in its ability to modify VTNS rates, AT&T adds, VTNS customers might reduce usage to the minima provided in the tariff and unnecessarily reduce the contribution of VTNS to recovering AT&T's fixed costs. *Id.* at 6.

Transmittal 1955

8. Transmittal No. 1955 was filed December 7, 1989 and is scheduled to become effective February 4, 1990 on 59 days' notice. Sprint and Williams filed petitions to reject or suspend on December 22, 1989 and AT&T filed its reply on January 5, 1990.

9. Transmittal 1955 establishes VTNS Option 25, a five-year arrangement serving the United States, Puerto Rico and the U.S. Virgin Islands. The minimum annual charge of $9.1 million reflects an initial configuration based on 705 Measured Ports and 562 DTCs, the latter divided into 456 DTCs at 9.6 kbps, 81 DTCs at 56 kbps, and 25 DTCs at 1.5 Mbps. The total number of ports may not be decreased below 564, the 9.6 kbps DTCs reduced below 365, the 56 kbps DTCs reduced below 65, or the quantity of 1.5 Mbps DTCs decreased below 20 without subsequent agreement. Measured charges incurred under the option's four rate schedules are discounted by a volume pricing plan, and a separate volume pricing plan applies to 1.5 Mbps DTCs.

10. Sprint contends that AT&T has not established that this package is unlike other VTNS options, that Option 25 is effectively restricted to this customer, and that the cost support is seriously deficient. Sprint Petition at 1-2. Sprint incorporates by reference its lengthier petition directed at VTNS Options 17, 18 and 19. *Id.* at 2-3.

11. Williams asserts that AT&T's demand projections are not reliable, that the absence of complaints about denial of service does not establish that Tariff 12 options do not violate the Act, and that the Commission should treat VTNS as it has treated the individually tariffed DS3 offerings of local exchange carriers. Williams Petition at 20 n.16; 23 n.19; and 5-6, 24 n.20.

12. AT&T replies that the tariff revisions require its customer to pay minimum charges that essentially moot the risk that otherwise would be posed by demand below projected levels. AT&T Reply at 4-5. AT&T also asserts that Williams' contentions respecting complaints ignore the Commission's general determinations respecting Tariff 12 offerings' consistency with the Act. Finally, AT&T maintains that the discrimination identified in the DS3 context involved like services, as that term is used in § 202(a) of the Communications Act, 47 U.S.C. § 202(a), while VTNS is unlike AT&T's other tariffed services. *Id.* at 5-7.

Transmittals 1974, 1975, 1976, 1987 and 1988

13. The first three transmittals of this group were filed December 18, 1989 and have been briefly deferred to become effective February 4, 1990 on 48 days' notice. The latter two were filed December 21, 1989 and are scheduled to become effective February 4, 1990 on 45 days' notice. All five establish new VTNS Options. Williams filed a petition January 2, 1990, directed to these five Transmittals. On the same day Sprint filed a petition directed to Transmittals 1974, 1975 and 1976. Sprint also filed a subsequent petition on January 5, 1990 directed to Transmittals 1987 and 1988. AT&T filed a reply responding to all three petitions on January 12, 1990.

14. By Transmittal 1974, AT&T establishes as VTNS Option 26 an arrangement serving the United States, Puerto Rico and the U.S. Virgin Islands. The minimum annual charge for the initial five-year term is $22.6 million, based on the provision of 2,156 Measured Ports, 550 Rate Option 1 Measured Remote Ports and 58 Rate Option 2 Measured Remote Ports. The original configuration also includes 174 DTCs at 9.6 kbps and below, 152 DTCs at 1.5 Mbps, and 845 VTCs. The total number of ports may not be reduced below 2,073 without further agreement, and the total number of DTCs may not be decreased below 244 unless otherwise agreed. The measured charges and charges for transmission capabilities are subject to separate volume discount plans.

15. By Transmittal 1975, AT&T establishes as VTNS Option 27 a configuration serving the United States, Puerto Rico and the U.S. Virgin Islands, and specific international locations. VTNS Option 27 is initially established for a three-year term, with a minimum annual charge of $17.1 million. This charge is predicated on a configuration employing 213 Rate Option 2 Measured Remote Ports, 2928 Measured Ports, and 125 DTCs at 1.544 Mbps, 2 DTCs at 56 kbps, and a single DTC at 9.6 kbps. In addition, VTNS Option 27 includes 414 VTCs and 2 international DTCs at 56 kbps. The quantity of each respective service element may not be decreased below 50 percent of the original level without a subsequent agreement. Distinct volume discounts are applied to international usage and to DTC network components (*i.e.*, exclusive of access components).

16. By Transmittal 1976, AT&T establishes as VTNS Option 28 an arrangement serving the United States, Puerto Rico and the U.S. Virgin Islands, and specific international locations. VTNS Option 28 is initially established for a three-year term with a minimum annual charge of $4.1 million. This charge is based on a configuration initially employing 460 Rate Option 1 Measured Remote Ports, and 43 Rate Option 2 Measured Remote Ports, and 107 DTCs at 9.6 kbps, 15 DTCs at 56 kbps, and 22 DTCs at 1.5 Mbps. The total number of ports may not be reduced below 402, 9.6 kbps DTCs may not be reduced below 83, 56 kbps DTCs reduced below 10, and 1.5 Mbps DTCs below 18, without a subsequent agreement. The network components of DTCs are discounted in two steps determined by volume.

17. By Transmittal No. 1987, AT&T establishes VTNS Option 29, serving locations in the United States, Puerto Rico and the U.S. Virgin Islands, and specific international locations. The three-year term of this arrangement entails a minimum annual charge of $12.3 million, predicated on an initial configuration of 1342 Measured Ports, 362 Rate Option 1 Measured Remote Ports and 68 Rate Option 2 Measured Remote Ports. In addition, the original configuration relies on 72 DTCs at 9.6 kbps, 145 DTCs at 1.5 Mbps, and 79 VTCs. The total number of ports may not be reduced below 1,070, and the number of VTCs reduced below 63, without further agreement. In addition, the quantity of 9.6 kbps DTCs may not be reduced below 58, or the number of 1.5 Mbps DTCs decreased below 116, without subsequent agreement. Separate volume discounts apply to measured charges for domestic usage, to international measured usage, and to combined monthly charges for DTCs and VTCs.

18. By Transmittal 1988, AT&T establishes as VTNS Option 30 a configuration serving the United States, Puerto Rico and the Virgin Islands, and specific international locations. VTNS Option 30 is initially established for a five-year term, with a minimum annual charge of $16.3 million. This charge is predicated on an initial configuration employing 926 Measured Remote Ports and 3,024 Measured Ports. Ports may not be reduced below 1,963 without agreement. In addition, VTNS Option 30 specifies initial quantities of VTC and DTC elements, separated into network and access components. Distinct volume discount plans apply to VTNS measured charges for domestic calls, for international calls, and for DTC/VTC network components.

19. Williams' joint petition asserts that the Commission's decision to mandate removal of individual case basis (ICB) rates for DS3 services from the local exchange carrier tariffs[1] confirms the statutory prohibition of different charges to different customers for like services, while the Tariff 12 regime confers "unfettered and undefined" discretion on AT&T to determine eligibility for VTNS. Williams Petition at 5-7. Williams renews its criticism of AT&T demand and revenue projections, stating that the positive net revenues described in the Descriptions and Justifications for VTNS Options 26 through 30 are tenuous. Williams notes that Option 27 shows a first-year net of $1,000 despite revenues of $17 million, and Option 29 (DuPont revisited) will show positive net revenue at minimum demand only by dint of savings claimed in overall costs. *Id.* at 12-13.

20. Sprint in both its petitions repeats assertions from its petitions against earlier Tariff 12 filings. Sprint maintains that AT&T has not established that these packages are unlike other VTNS options, that Options 29 and 30 are effectively restricted to individual customers, and that the cost support is seriously deficient. Sprint 1974/1975/1976 Petition at 1-2; Sprint 1987/1988 Petition at 1-3. Sprint in each petition also incorporates by reference its lengthier petition directed at VTNS Options 17, 18 and 19.

21. AT&T replies that petitioners continue to reiterate arguments raised in past petitions, and found insufficient to warrant rejection or suspension of previous VTNS

offerings. AT&T Joint Reply at 1-3. Addressing Williams' contention that the absence of customer complaints under Tariff 12 does not establish compliance with the Act, AT&T recites the Commission's statement in the *April 18 Order* that it does not "anticipate, as a general matter, rejecting or suspending and investigating such tariffs for lack of general availability," and states that no customer has complained of a denial of service. *Id.* at 5-6. AT&T replies to Williams' criticism of its demand projections by noting that customers for a VTNS option have consistently been committed to a specific minimum quantity of service, and the commitment is guaranteed by a minimum charge specified in the tariff. *Id.* at 6-7. As to Williams' assertion that the Commission should treat VTNS offerings as it did the individually tariffed DS-3 offerings of local exchange carriers, AT&T contends that the disparate rates involved there were applied to access offerings admittedly "like," in contrast to VTNS' distinction from other tariffed offerings. *Id.* at 7-8.

22. The Common Carrier Bureau has reviewed the captioned transmittals, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

23. Accordingly, IT IS ORDERED that the petition to reject, suspend or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1935, filed by Williams Telecommunications Group, Inc., IS DENIED.

24. IT IS FURTHER ORDERED, that the petition to reject, suspend or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1939, filed by Williams Telecommunications Group, Inc., IS DENIED.

25. IT IS FURTHER ORDERED, that the petitions to reject, suspend or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1955, filed by US Sprint Communications Company Limited Partnership and by Williams Telecommunications Group, Inc., ARE DENIED.

26. IT IS FURTHER ORDERED, that the joint petition to reject, suspend or investigate American Telephone and Telegraph Company AT&T) Transmittal Nos. 1974, 1975, 1976, 1987, and 1988, filed by Williams Telecommunications Group, Inc., and the petition filed by US Sprint Communications Company Limited Partnership (Sprint) to reject, suspend or investigate Transmittal Nos. 1974, 1975, and 1976, as well as the subsequent petition filed by Sprint to reject, suspend or investigate AT&T Transmittal Nos. 1987 and 1988, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, FCC 89-339, 4 FCC Rcd 8634 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-25

In re Applications of

Standard Broadcasting, Inc. (hereafter "Standard")	File No. BPH-870624MI
Horace Edward Crapps, Jr. (hereafter "Crapps")	File No. BPH-870626MU
Lexington Communications, Ltd. (hereafter "Lexington")	File No. BPH-870629MV
Carolinia Communications Limited Partnership (hereafter "CCLP")	File No. BPH-870629NJ

For Construction Permit for a New FM Station on Channel 253A in Lexington, South Carolina

HEARING DESIGNATION ORDER

Adopted: January 19, 1990; Released: February 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Crapps*. Section II, Item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Crapps has not completed Item 4(a) correctly. The Crapps application gives a post office box number as his residence address. Accordingly, Crapps must submit an amendment which gives all the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. The Crapps application being considered in this proceeding conflicts with a pending Rule Making proceeding to modify the frequency of WCOS-FM, Columbia, South Carolina from Channel 250C to Channel 248 per Docket 86-72. Crapps' application was filed after the petition for Rule Making had been filed. Consequently, the Crapps application met all the spacing criteria of 47 C.F.R. §73.207(a) and was accepted for filing. Accordingly, we will designate this appliction for hearing. However, if the construction permit is issued to Crapps it will be conditioned upon the outcome of the WCOS-FM, Columbia, SC Channel 248 Rule Making proceeding.

4. *Lexington*. Section II, Item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Lexington has not completed Item 4(a) correctly. The Lexington application gives a post office box number as the residence address for one of its principals, Lewis McGee Dubose. Accordingly, Lexington must submit an amendment which gives all the information required by Section II, Item 4(a), to the presiding Administrative Law Judge within 30 days of release of this Order.

5. *CCLP*. Information before the Commission indicates that CCLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question CCLP's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against CCLP in this proceeding.

6. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Crapps	February 01,1988 (engineering)
CCLP	May 24, 1989, June 08, 1989 September 13, 1989

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed real party-in-interest to the application of CCLP.

2. To determine whether CCLP's organizational structure is a sham.

3. To determine, based on the evidence adduced pursuant to issues 1 and 2 above, whether CCLP possesses the basic qualifications to be a Commission licensee.

4. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Crapps shall submit an amendment which contains the information required by Section II, Item 4(a) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That Lexington shall submit an amendment which contains the information required by Section II, Item 4(a) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHER ORDERED, That, if the ultimate construction permit is issued to Crapps in the Lexington, South Carolina proceeding, it will be conditioned upon whatever action is taken in the WCOS-FM, Columbia, South Carolina Channel 248 Rule Making proceeding.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by CCLP and Crapps ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-40

In re Applications of

CONWAY BROADCASTING CO., INC. (hereafter "Conway") File No. BPH-880229NI

SUN FUN COMMUNICATIONS OF CONWAY, LIMITED PARTNERSHIP (hereafter "Limited") File No. BPH-880301OT

COASTAL CAROLINA FAMILY RADIO, INC. (hereafter "Coastal") File No. BPH-880301PA

For Construction Permit
for a New FM Station on Channel 230A
in Conway, South Carolina

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. None of the applicants has completed Item 4 correctly. Conway's application gives a post office box number as the residence address for Tommie W. Grainger, Jackie H. Frazier and James R. Frazier, and gives no address for the applicant. Limited has specified no address for the applicant. Accordingly, both must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. Coastal petitioned for leave to amend its application on August 3, 1989 and December 6, 1989. The accompanying amendments were filed after June 15, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Conway and Limited shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Coastal ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-36

In re Applications of

Don Bevilacqua (hereafter "Bevilacqua") File No. BPH-880216MR

Cliff Gill dba Pioneer Broadcasting Company (hereafter "Pioneer") File No. BPH-880217MN

For Construction Permit for a New FM Station in Shafter, California Channel 282A (104.3 MHz)

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Pioneer petitioned for leave to amend its application on February 21 and July 13, 1989. The accompanying amendments were filed after June 6, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Pioneer ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FOOTHILLS COMMUNICATIONS ASSOCIATES, INC. File No. BMPH-860326JX

For Extension of Construction Permit
of WBPK(FM), Flemingsburg, Kentucky

ORDER

Adopted: January 31, 1990; Released: February 13, 1990

By the Commission:

1. On April 1, 1988, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, denied a Petition for Reconsideration filed by Foothills Communications Associates, Inc. ("Foothills") on September 8, 1987 and supplemented on September 18, 1987. The petition sought reversal of the Audio Services Division's August 27, 1987 action denying the subject application for extension of construction permit. The Commission has before it now an Application for Review filed by Foothills.

2. The Application for Review restates arguments made in Foothills' petition for reconsideration. We have carefully reviewed the Bureau's disposition of the petition for reconsideration and find no reason to disturb that ruling. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review IS DENIED.

3. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail-Return Receipt Requested, a copy of this Order to Foothills.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

J.A. SAVAGE FOIA Control No. 88-153

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1990; Released: February 13, 1990

By the Commission:

1. Before the Commission is an Application for Review filed by J.A. Savage (Savage), a correspondent with *Computerworld*, seeking review of a decision entered by the Chief, Field Operations Bureau and the Chief Engineer, Office of Engineering and Technology (Bureau) on June 29, 1989. That ruling denied, in part, her request for inspection of records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

2. Specifically, the requester sought copies of: 1) citations for violations of FCC requirements of Class A or Class B computers from January 1986 to September 3, 1988; 2) notices of fines for violations of FCC requirements for Class A or Class B computers from January 1986 to September 7, 1988; 3) notices of non-payment of fines for violations of FCC requirements for Class A or Class B computers from January 1986 to September 7, 1988; 4) notices of payments of fines for violations of FCC requirements for Class A and Class B computers from January 1986 to September 7, 1989; 5) test reports done in the FCC lab in Maryland by the Sampling and Measurements Branch on Class A or Class B computers from January 1986 to September 7, 1988 in the application for FCC certification process; 6) test reports done in the FCC lab in Maryland by the Electrical Engineering Branch on Class A or Class B computers in the application for FCC certification process from January 1986 to September 7, 1988; 7) test reports done in the FCC lab in Maryland by the Electrical Engineering Branch performed under the "post grant" sampling on Class A and Class B computers from January 1986 to September 7, 1988.[1]

3. On December 6, 1988, the Chief, Field Operations Bureau released a computer listing of administrative enforcement actions in equipment marketing cases from January 1986 to September 1988, including sample documents.[2] Although the computer listing was "not limited just to Class A or Class B computer marketing violations," the Bureau suggested that Savage "compare a master list of Class A or Class B computer manufacturers or retailers against the listing" to obtain the information requested (*see* items number 1 through 3 in para. 3, *supra*).[3]

4. On June 29, 1989, the Bureau denied Savage's request for the test reports (*see* items number 4 through 7 in para. 2, *supra*) pursuant to the deliberative process privilege contained in FOIA Exemption 5, 5 U.S.C. § 552(b)(5).[4] The Bureau explained that the deliberative process privilege protects from mandatory disclosure opinions, advice, deliberations and recommendations, as well as factual summaries of material contained in inter-agency or intra-agency memorandums "which are prepared by the staff of an agency solely to assist the agency in making a complex decision."[5] The Bureau also noted that disclosure would compromise the effectiveness of technical parameters employed by the Commission staff in decisionmaking.

5. On appeal, Savage asks the Commission to reverse the June 29, 1989 decision to deny access to the equipment authorization test reports and post-grant sampling test reports, including any computerized data.[6] According to the requester, applicable caselaw requires agencies to release segregable, factual material and to indicate "what portion of data is non-exempt and how exempt portions are distributed throughout the data."[7] Emphasizing that she is "not asking for deliberative information but simply the pure factual information on . . . random testing of Class B computers for post grant evaluation," the requester argues that "[b]y not releasing factual information, the FCC is acting in bad faith under the Act."[8]

6. Upon review, we agree with the decision reached by the Bureau that the requested pre-authorization and post-grant test reports are exempt from disclosure in their entirety.[9] The Supreme Court in *EPA v. Mink*, 410 U.S. 73 (1973), recognized the factual matter/deliberative matter test relied upon by the requester. However, the courts have also recognized that rigid adherence to this approach may lead to incorrect results in some cases[10] and have focused as well on the effect of the materials' release; *i.e.*, "whether disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions."[11]

7. The test measurements at issue do not represent final "facts" concerning particular computers. The testing process is not an exact science and there are often several sets of measurements for a particular computer because measurements are subject to change and review by supervisors. In light of that, we agree with the Bureau's finding that the technical evaluations, opinions, advice and recommendations that comprise these test reports are part of the agency's deliberative process and that the reports in their entirety are properly withheld pursuant to Exemption 5.[12]

8. We also conclude that these pre-authorization and post-grant test reports fall within the protective ambit of FOIA Exemptions 7(E), 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) protects records or information compiled for law enforcement purposes where disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law . . . ."[13] If we were to release either the pre-authorization or the post-grant test reports, computer manufacturers could discern the measurement error tolerance criteria used by the Commission when deciding whether to grant an application or to take specific enforcement action; *e.g.*, the issuance of a Notice of Apparent Liability. Manufacturers could use this information to design computers that merely comply with the measurement error tolerance limits rather than to comply with the measurement standards in FCC rules. Thus, we find

that disclosure of the requested information could reasonably be expected to interfere with FCC enforcement of its rules.

9. As to test reports concerning any pending applications or applications that have been denied, we find that this material is also exempt from mandatory disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), as reflected in the Commission's own rules. Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[14] The purpose of this Exemption is to protect the interests of commercial entities, such as computer manufacturers, that submit proprietary information to the government.[15] The Commission's rules provide that "applications for equipment authorizations . . . and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization."[16] The rule is designed to implement FOIA Exemption 4 by guarding against premature disclosure to competitors of manufacturers' plans to introduce new computer products. Disclosure of test reports for applications that have not yet been granted would reveal the same information that is intended to be shielded by the rule and thus would defeat the very purpose of the rule. Accordingly, we find that the information is protected by FOIA Exemption 4.

10. Accordingly, IT IS ORDERED, That the Application for Review filed by J.A. Savage IS DENIED.

11. The requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Initial Request Letter* at 1.

[2] *See* Letter dated December 6, 1988, from Richard M. Smith, Chief, Field Operations Bureau, to Ms. J.A. Savage at 1.

[3] *Id.*

[4] *See* Letter dated June 29, 1989, from Richard M. Smith, Chief, Field Operations Bureau, to Ms. J.A. Savage at 1. In addition, the Bureau provided the requester "with copies of administrative enforcement files regarding specific cases" that she "identified from the computer list." *Id.*

[5] *Id.*

[6] *Application for Review* at 2.

[7] *Id.* at 1.

[8] *Id.*

[9] Ms. Savage requested reports from January 1986 through September 7, 1988. Reports of this type are retained for a period of one year only and are then destroyed. Thus, no reports exist for the years 1986 and 1987.

[10] *See Monrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974), wherein the court stressed that "Exemption 5 was intended to protect not simply deliberative material, but also the deliberative process of agencies," and further developed the factual/deliberative test "to recognize that in some cases the selection of facts or summaries may reflect a deliberative process which Exemption 5 was intended to shelter." Moreover, as observed by the court in *Mead Data Central, Inc. v. Dept. of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1974), "[i]n some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5)."

[11] *Dudman Communications Corp. v. Dept. of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *see Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 82-86 (2d Cir. 1979).

[12] We observe that because this material is exempt in its entirety, *i.e.*, there are no segregable factual portions that could be disclosed, we need not, as the requester asserts, describe what proportion of information is nonexempt and how the material is dispersed throughout the documents.

[13] 5 U.S.C. § 552(b)(7), *as amended by* Pub. L. No. 99-570, § 1802 (1986).

[14] 5 U.S.C. § 552(b)(4).

[15] *See generally, Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[16] *See* 47 C.F.R. § 0.457(d)(1)(ii); *see also In the Matter of Amendment of Part 0, Rules and Regulations to Implement P.L. 89-487*, 8 FCC 2d 908, 924 (1967); *In the Matter of Amendment of §§ 0.455(a) and 0.457(d)(1)(ii), Freedom of Information Rules*, 54 FCC 2d 905 (1975). Section 0.457(d) further provides that "[f]ollowing the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request." *See also* 47 C.F.R. § 2.941, which references section 0.457, providing that "information relating to equipment authorizations such as data submitted by laboratory tests of the device, etc., shall be available in accordance with § 0.457 of this chapter." We note that the test measurements mentioned in the rules (which are publicly available after the effective date of the authorization) refer to measurements submitted by the applicant, not measurements taken by the FCC.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ARCHDIOCESE OF DETROIT — BMPIF-840727DC
For License in the Instructional Television Fixed Service on Channel A4, Detroit, Michigan

WAYNE STATE UNIVERSITY — BMLIF-840725DC
For License in the Instructional Television Fixed Service on Channels B1, B2 and D1, Detroit, Michigan

MACOMB INTERMEDIATE SCHOOL DISTRICT — BPIF-831209DE
For License in the Instructional Television Fixed Service on Channels B3 and B4, Detroit, Michigan

WAYNE COUNTY INTERMEDIATE SCHOOL DISTRICT — BPIF-840201DB
For License in the Instructional Television Fixed Service on Channels C1 and C4, Detroit, Michigan

BOARD OF EDUCATION OF THE CITY OF DETROIT — BMLIF-880129DA
For License in the Instructional Television Fixed Service on Channels C2 and C3, Detroit, Michigan

DETROIT EDUCATIONAL TELEVISION FOUNDATION — BPIF-830930DA
For License in the Instructional Television Fixed Service on Channels D2, D3 and D4, Detroit, Michigan

OAKLAND SCHOOLS — BMPIF-880129DB
For License in the Instructional Television Fixed Service on Channels G3 and G4, Detroit, Michigan

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC. — BPIF-831214DC
For License in the Instructional Television Fixed Service on Channels B3 and B4, Detroit, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1990; Released: February 13, 1990

By the Commission:

1. The Commission has before it for consideration: (a) a letter by the Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, dated June 29, 1988, ("Staff ruling") which dismissed the above-captioned application of Hispanic Information and Telecommunications Network, Inc., ("HITN") and granted the other captioned applications for Instructional Television Fixed Service ("ITFS") stations; (b) a letter by the Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, dated May 3, 1989, ("Reconsideration ruling") which denied a petition for reconsideration of the Staff ruling filed by HITN; (c) an application for review of the Reconsideration ruling filed by HITN on June 6, 1989; and (d) related pleadings.[1]

2. In brief, HITN's application for review contends (1) that the grant of waivers of the ITFS cut-off rules, Section 74.911 of the Commission's Rules, 47 C.F.R. §74.911, for certain amendments to some of the granted applications in this proceeding is a violation of the Commission's rules and HITN's constitutional rights; and (2) that the staff action constitutes a grant of fifteen channels to CTN, in violation of Section 74.902(d) of the Commission's Rules, 47 C.F.R. §74.902(d), which limits ITFS licensees to no more than four channels within the same geographical area.

3. The staff actions have been reviewed and we conclude that the matters involved were properly decided in accordance with the Rules and applicable precedent. Further, Section 1.115(c) of the Commission's Rules, 47 C.F.R. §1.115(c), provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." None of the arguments in HITN's application for review were contained in any of its previous pleadings in this proceeding. Accordingly, HITN's application for review will be denied pursuant to Section 1.115(c) of the Rules. Nevertheless, as discussion of some of these matters could assist interested parties in more fully understanding the basis for the actions taken in this proceeding, we will address HITN's contentions.

4. *Background.* In dismissing HITN's application for ITFS channels B3 and B4 in Detroit, the Staff ruling stated that, under the rules and policies established in *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83 - 523* (" *ITFS Second Report and Order* "), 101 FCC 2d 49 (1985), "[n]onlocal applicants are not eligible to compete for ITFS facilities with local applicants which filed before the end of the local priority period." The Staff ruling further stated that a

local applicant, Macomb Intermediate School District, had filed a conflicting application for ITFS channels B3 and B4 in Detroit prior to the end of the local priority period; and that HITN, which was not local in Detroit, had failed to amend its application to substitute a local applicant in its place as provided for in *Memorandum Opinion and Order on Reconsideration* (" *ITFS Recon.* "), 59 RR 2d 1355, 1365 (1986). Accordingly, the Staff ruling held that HITN's application should be dismissed.

5. With regard to the waiver of the cut-off rules, all of the grants in this proceeding were made possible by, and were dependent upon, a settlement agreement which eliminated the mutual exclusivity between all of the eligible applicants. The settlement agreement, filed shortly before issuance of the Staff ruling and some years after the filing of the original applications in this proceeding, involved amendments and modifications to the local applications which, as noted in the Staff ruling, would normally have been considered major modifications requiring a cut-off period for the filing of competing applications and petitions to deny. However, as we stated in *ITFS Recon., supra* at 1381 n.47:

> The cut-off rules pertaining to major change proposals may be waived in situations where the proposals are filed to accommodate settlement agreements between applicants that have previously achieved cut-off status and the settlement resolves mutually exclusive proposals.

The Staff ruling observed that the amendments and modifications were "integral parts of a settlement agreement which successfully eliminate[d] the mutual exclusivity of all involved qualified applicants . . . ", and "involve[d] only channels . . . already held by or timely applied for and cut off by the qualified local applicants" which were parties to the settlement. The Staff ruling further noted that public notice of the amendments and modifications, as well as waiver of the cut-off rules for those amendments and modifications, was issued on February 10 and 12, 1988, and no objections had been received. Accordingly, the Staff ruling held that all of the amendments and modifications would be treated as minor, in accordance with *ITFS Recon., id.* at 1381 n.47.

6. In its petition for reconsideration, HITN asserted that the Staff ruling erred in dismissing its application without a hearing. HITN argued that, under *ITFS Second Report and Order, supra*, and *ITFS Recon., supra*, nonlocal applicants were entitled to comparative consideration with local applicants under a point system established for ITFS. HITN did not address the local priority period which was established and affirmed in those *Orders*. HITN further argued that, by granting the mutually exclusive application of Macomb without affording HITN a hearing on the comparative merits of its application, the Staff ruling directly contravened the holding of the Supreme Court in *Ashbacker Radio Corporation v. F. C. C.* (" *Ashbacker v. FCC* "), 326 U.S. 327 (1945). In addition, HITN asserted that the amendments and modifications contained in the settlement agreement should have been treated as major changes and subjected to the cut-off rules for major change proposals. HITN argued that the amendments and modifications in question "had *not* 'previously achieved cut-off status', as prescribed by the Commission's rules, and therefore, the staff's reliance upon footnote 47 is completely misplaced." (Emphasis in original.)[2]

7. The Reconsideration ruling noted that HITN's assertions concerning the dismissal of its application and its entitlement to comparative consideration with local applicants under *ITFS Second Report and Order, supra, ITFS Recon., supra*, and/or *Ashbacker v. FCC, supra*, were essentially the same as arguments rejected by the United States Court of Appeals for the District of Columbia in *Hispanic Information and Telecommunications Network, Inc. v. F.C.C.* (" *HITN v. FCC* "), 865 F.2d 1289 (D.C. Cir. 1989). In rejecting HITN's arguments in that proceeding, the Court of Appeals stated:

> HITN has simply misread . . . [*ITFS Recon.*]. The Commission did provide nonlocal applicants with a three-month opportunity to amend their applications by substituting a local entity. Otherwise, though, . . . [*ITFS Recon.*] left intact the principle that, until the end of the local priority period, local applicants would automatically be chosen over mutually exclusive nonlocal applicants. We believe that . . . [*ITFS Recon.*] unequivocally reaffirmed the earlier decision to establish the local priority period, providing for "the processing and grant of pending and new applications by local entities without competition by nonlocal entities during that time and notwithstanding any mutually exclusive pending nonlocal applications." . . . [*ITFS Recon., supra*] at 1358.

HITN v. FCC, supra at 1293. It is undisputed that HITN was a nonlocal applicant in Detroit. Since it was therefore ineligible to compete with qualified local applicants which filed during the local priority period, the Reconsideration ruling rejected without discussion HITN's assertions that it was entitled to comparative hearing rights under *ITFS Second Report and Order, supra, ITFS Recon., supra*, and/or *Ashbacker v. FCC, supra*.

8. With regard to the waiver of the cut-off rules for the amendments and modifications contained in the settlement agreement, the Reconsideration ruling stated that, even if HITN had sought reconsideration or review of this issue in a timely manner, [3] the language of Note 47 clearly demonstrated that its argument was without merit:

> Note 47 plainly states that . . . the cut-off rules for major change proposals may be waived where the " *applicants* . . . have previously achieved cut-off status," and *not* where the amendments or modifications *themselves* "have previously achieved cut-off status." Indeed, it would serve no purpose for the Commission to establish a policy under which it would waive the cut-off rules for a proposal which has already been cut-off. All of the applicants and all of the channels referred to in the . . . [Staff] ruling had, in fact, already been accorded cut-off status . . . .All of the amendments and modifications were "integral parts" of a settlement agreement which did, in fact, resolve mutually exclusive proposals between all of the qualified applicants for the channels involved. Thus, it is clear that the instant case is precisely the type of situation which the

> Commission contemplated in providing for waiver of the cut-off rules in *ITFS Recon., supra* at 1381 n.47.

9. *HITN's Application for Review.* In its application for review, HITN contends that the Reconsideration ruling "completely misinterpreted" Note 47 to *ITFS Recon., supra.* In support of this contention, HITN asserts:

> The Commission specifically considered whether it wanted "National" networks like HITN to be qualified to be ITFS licensees and decided that "Nationals" have important contributions to make to the development of the ITFS service, and should be allowed to be licensed . . . [*ITFS Recon., supra* at 1363]. The Commission also specifically considered special preferences for minorities, to ensure their participation in this new service, but declined to do so, since, *inter alia*, minority applicants would have a fair opportunity to file and compete for licenses like anyone else. The Commission believed the selection process it had devised would be race neutral, permitting minorities to receive licenses, in the same fashion as any other applicant.

HITN concludes that "[t]he benefits of National ITFS networks" would be "precluded" and "minority participation" would be "thwarted" if "White-controlled institutions" are permitted to "divide the available channels among themselves" and "decide . . . that the only minority app[l]icant shall get no channels." HITN also argues that the outcome in this proceeding is "Constitutionally suspect, under the First and Fourteenth Amendments, because it effectuates a conscious decision by seven majority-dominated (White) institution[s] to . . . divide all the available ITFS channels among themselves and eliminate the only minority-dominated applicant seeking access to this Government-allocated benefit, i.e., broadcast licenses."

10. As discussed above, HITN argued in its petition for reconsideration that the staff ruling's "reliance upon footnote 47 . . . [was] completely misplaced" solely because the amendments and modifications in the settlement agreement "had *not* 'previously achieved cut-off status', as prescribed by the Commission's rules . . . ." The Reconsideration ruling's rejection of this argument as both untimely and without merit, as discussed in paragraph 8, *supra*, is clearly correct, and is not challenged by HITN. HITN's arguments concerning the potential contributions of "national" ITFS applicants and the effect of an applicant's minority status on the applicability of *ITFS Recon., supra* at 1381 n.47, are presented for the first time in the instant application for review. Accordingly, they are clearly "questions of fact or law upon which the designated authority has been afforded no opportunity to pass", and are therefore not properly included in an application for review. *See* Section 1.115(c) of the Commission's rules, 47 C.F.R. §1.115(c). However, we will nevertheless address these arguments in an effort to remove any misunderstanding of the basis for the actions taken.

11. *ITFS Recon., supra* at 1381 n.47, clearly provides that the cut-off rules for major change proposals may be waived when two conditions are satisfied: (1) the proposals must be "filed to accommodate settlement agreements between applicants that have previously achieved cut-off status"; and (2) the settlement agreement must "resolve[] mutually exclusive proposals." *Id.* At this point in this proceeding it is beyond dispute that HITN was a nonlocal applicant in Detroit, and therefore was not eligible to compete with local applicants which filed prior to the end of the local priority period. *HITN v. FCC, supra* at 1293. It is further beyond dispute that all of the amendments and modifications in the settlement agreement to which HITN objects "involve[d] only channels . . . already held by or timely applied for and cut off by the *qualified local* applicants . . . " (Staff ruling, 1, emphasis added); and that those amendments and modifications were "integral parts of . . . [that] settlement agreement which successfully eliminate[d] the mutual exclusivity of *all involved qualified* applicants . . . " (*id.*, emphasis added). Qualified local applicants who wish to eliminate mutual exclusivity among their applications pursuant to *ITFS Recon., supra* at 1381 n.47, are not required to include an ineligible nonlocal applicant in their settlement agreement. Thus, the Reconsideration ruling was correct in holding that "it is clear that the instant case is precisely the type of situation which the Commission contemplated in providing for waiver of the cut-off rules in *ITFS Recon., supra* at 1381 n.47."

12. The arguments in HITN's application for review concerning the applicability of *ITFS Recon., id.* at n.47, to the settlement agreement in this proceeding are based upon HITN's apparent unwillingness to accept the fact that it simply was not eligible to compete for ITFS channels with local ITFS appplicants that filed their applications prior to the end of the local priority period. Initially, we note that the Commission's statements on the potential benefits of "national" ITFS networks are clearly irrelevant to HITN's eligibility to compete with timely filed local ITFS applicants, and, hence, to the applicability of *ITFS Recon., supra* at 1381 n.47 to the settlement agreement in the instant proceeding. Although the Commission does discuss the role of "national" ITFS applicants, the eligibility of such "national" applicants to apply for ITFS licenses is specifically limited to "whatever channels remain unassigned" *after* the expiration of the local priority period.[4] *See* Section 74.932(a)(1) of the Commission's Rules, 47 C.F.R. §74.932(a)(1). The fact that all qualified local applicants may negotiate and conclude a settlement agreement to eliminate mutual exclusivity among the qualified local applications pursuant to *ITFS Recon., supra* at 1381 n.47, does not retroactively confer eligibility on a "national" applicant.

13. Similarly, HITN's arguments concerning its minority composition are irrelevant to its eligibility to compete with timely filed local ITFS applicants. Addressing first HITN's assertion that the ITFS selection process devised by the Commission was supposed to permit minority applicants to receive licenses "in the same fashion as any other applicant", we note that the process established by the Commission for selecting ITFS licensees, in fact *and* as applied in this proceeding, does just that. As repeatedly stated by the Commission in this and other proceedings to which HITN has been a party, and as affirmed by the U.S. Court of Appeals in *HITN v. FCC, supra*, nonlocal entities are not eligible to compete for ITFS channels with local applicants that file prior to the end of the local priority period. This is so regardless of whether any particular entity, local or nonlocal, is composed in whole or in part of minorities. Although it concedes that the Commission specifically declined to adopt "special preferences" for

minority ITFS applicants. HITN is clearly arguing for a "special preference", for itself, as a minority organization, *i.e.*, entitlement to comparative consideration with timely filed local applicants solely because of its minority composition. Such a "special preference" for HITN was specifically rejected by the Commission in *ITFS Second Report and Order*, *supra* at 63. *See also*, *id.* at 71.

14. We next address HITN's argument that "minority participation" would be "thwarted" if "White-controlled institutions" (*i.e.*, Board of Education of the City of Detroit, Wayne County Intermediate School District, Macomb Intermediate School District, Oakland Schools, Wayne State University, Detroit Educational Television Foundation and Archdiocese of Detroit) could prevent "the only minority app[l]icant" from obtaining any ITFS channels, and its assertion that the outcome in this proceeding is "Constitutionally suspect" because it "effectuates a conscious decision by seven . . . (White) institution[s] to . . . eliminate the only minority applicant." In the settlement agreement, the parties articulated their rationale for excluding HITN from the settlement: HITN's application was subject to dismissal because HITN was a nonlocal applicant and was, as such, ineligible to compete with local applicants that filed prior to the end of the local priority period. Letter from Counsel for CTN to the Secretary of the Commission, dated January 28, 1988, p.2. HITN has not submitted a single fact which even indicates, much less demonstates, that its exclusion from the settlement agreement was in any way related to its racial or ethnic composition, or to any factor other than its basic ineligibility as a nonlocal applicant. HITN merely cites its exclusion from the settlement agreement by Board of Education of the City of Detroit, *et. al.* and concludes, *ipso facto*, that its exclusion was due to its minority composition. Accordingly, HITN has failed to establish a *prima facie* case. Considering the facts before the Commission, we can only conclude that HITN's exclusion from the settlement agreement was due solely to, and was justified by, its ineligibility as a nonlocal applicant.

15. HITN does not address the local priority period, or its consequent ineligibility to compete with timely filed local applicants, except to characterize it as "deceptive procedural sleight-of-hand" utilized as part of CTN's alleged "conspiracy" to deprive HITN of ITFS channels in Detroit. However, such unsupported, subjective characterizations do not address, much less negate, the absolute priority afforded local applicants over nonlocal applicants pursuant to the ITFS Rule Making proceeding. HITN's "conspiracy" theory merely reflects its refusal to accept this basic, court-approved aspect of the Commission's ITFS rules. In view of the foregoing, it is clear that the arguments in HITN's application for review concerning the applicability of *ITFS Recon.*, *supra* at 1381 n.47, to the settlement agreement in this proceeding are without merit, and do not justify or necessitate revision of the Reconsideration ruling.

16. HITN also argues that the staff action constitutes a grant of fifteen channels to CTN, which violates the Commission's "four channel rule," Section 74.902(d) of the Commission's Rules, 47 C.F.R. §74.902(d). This assertion is presented for the first time in the instant application for review, and is therefore subject to denial. *See* Section 1.115(c) of the Commission's Rules, 47 C.F.R. §1.115(c). However, as with the other issues discussed herein, we will also address this assertion.

17. HITN asserts that CTN "must be considered one licensee in this proceeding"; that the purposes for the formation of CTN were "to resolve the mutually exclusive ITFS proposals in the Detroit area," and "to coordinate the efforts of the successful . . . [applicants] to construct and operate their systems"; and that CTN "indicated" in its settlement agreement "that the FCC must accept its proposal in its entirety, as a whole, and consider the group as one entity for the purpose of settlement." CTN did state that each of the amendments and modifications in the settlement agreement were "contingent upon Commission approval of the entire settlement plan . . . ." Letter from Counsel for CTN to the Secretary of the Commission, dated January 28, 1988, p.4. However, such conditions are a common characteristic of settlement agreements. The purpose of a settlement agreement is to amend applications so as to eliminate mutual exclusivity between qualified applicants, a goal which the Commission encourages. Such settlements are, by definition, voluntarily formulated and agreed to by the parties. If one amendment in a settlement agreement can be approved while another can be rejected, the structure of the settlement formulated by the parties will be changed without their participation or consent, and the original relationship between the parties may be altered to the detriment of one (or more) of the parties. This could deter mutually exclusive applicants from entering into settlement agreements, and the Commission's policy of encouraging settlements would therefore be frustrated. Thus, such conditions are intended for the mutual protection of each of the parties to the settlement, and do not transform the individual parties into one single entity. Further, the fact that CTN may have been organized in part to "coordinate the efforts" of the successful applicants does not transform CTN into the licensee of the channels involved. ITFS permittees and licensees frequently coordinate their efforts, *e.g.*, sharing transmitting towers, cooperating to reduce interference, etc. Such coordination of activities obviously does not amount to a merger of the parties, particularly in the absence of any evidence whatever of common control.

18. Finally, CTN's settlement agreement did *not*, explicitly or implicitly, directly or indirectly, "indicate[] that the FCC must . . . consider the group as one entity for the purpose of settlement", as claimed by HITN. On the contrary, the settlement agreement specifically provides that, "[w]hile these Amendments are being submitted as a package, each party is individually responsible for its application and will, upon grant, be individually responsible for compliance with all Commission rules and policies." Letter from Counsel for CTN to the Secretary of the Commission, dated January 28, 1988, p.2. Further, Section 74.902(d) expressly provides that one "licensee" may use no more than four channels in a single area. In this proceeding, seven separate licenses, each involving four or fewer channels, were issued to seven individual licensees. In view of the explicit recognition by CTN that each licensee is individually responsible for its licensed channels, and in the absence of any evidence to support HITN's assertion that CTN "was in fact the controlling entity of the seven license[s] issued in this proceeding", HITN's argument that the staff action constitutes a grant of fifteen channels to CTN in violation of the "four channel rule," Section 74.902(d) of the Commission's Rules, 47 C.F.R. §74.902(d), is without merit.

19. The Commission has fully considered all of the arguments in HITN's application for review and has found them to be both improperly raised and without merit. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. §1.115(g), HITN's application for review IS DENIED on both procedural and substantive grounds.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On June 20, 1989, an opposition to HITN's application for review was filed by Macomb Intermediate School District ("Macomb") and Community Telecommunications Network ("CTN"), a Detroit-area nonprofit organization whose members include all of the successful applicants in this proceeding. On June 28, 1989, a reply to the opposition was filed by HITN.

[2] HITN also argued in its petition for reconsideration that, in the absence of a waiver, the grant of Wayne State University's application violated the Commission's "four channel rule," Section 74.902(d) of the Commission's Rules, 47 C.F.R. §74.902(d); and that the Staff ruling did not properly consider a request to stay the processing of all minority ITFS applications. HITN's instant application for review does not question the Reconsideration ruling's rejection of these arguments.

[3] The Reconsideration ruling initially noted that, as stated in the Staff ruling, public notice of the amendments and modifications, as well as waiver of the cut-off rules for those amendments and modifications, was issued on February 10 and 12, 1988, and no objections were received; and that, therefore, HITN's argument for reconsideration of those actions, presented in a petition filed approximately six (6) months later, was untimely and should be dismissed.

[4] *ITFS Second Report and Order*, *supra* at 57-59; *ITFS Recon.*, *supra* at 1358-59, 1362 n.18, 1365-66. *See HITN v. FCC*, *supra* at 1293-94, where, as discussed above, HITN argued that it was entitled to comparative consideration with local applicants which filed during the local priority period. In making this argument before the Court of Appeals, HITN "relie[d] heavily on passages in . . . [*ITFS Recon.*, *supra*] which state that nonlocal institutions should not be excluded entirely from ITFS licenses." *Id.* at 1293. In rejecting this argument, the Court of Appeals stated that the language upon which HITN relied recognized only that ITFS operations by nonlocal entities would be "better than waiting indefinitely in the hope that a local applicant will appear", and that, therefore, the Commission provided that nonlocal applicants would be allowed to file for licenses *only* "where no local applicants had emerged during the local priority period." *Id.* at 1293-94.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-550
(Proceeding Terminated)

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules to Accommodate Next Generation Weather Radars in the 2900-3000 MHz Band

REPORT AND ORDER

Adopted: January 25, 1990; Released: February 13, 1990

By the Commission:

INTRODUCTION

1. By this action the Commission is amending the Table of Frequency Allocations in Section 2.106 of the Rules, 47 CFR 2.106, by adding a footnote to permit operation of Federal Government Next Generation Weather Radar (NEXRAD) systems in the 2900-3000 MHz band. Part 80 is also amended to recognize the need for other users of the 2900-3000 MHz band to avoid causing interference to these systems. NEXRAD systems offer improved weather forecasting capabilities that will enhance public safety. Further because of the limited nature of this allocation, existing systems will not be adversely affected.

BACKGROUND

2. On November 29, 1988, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to amend the Table of Frequency Allocations to provide for the operation of NEXRAD systems in the 2900-3000 MHz band.[1] This *Notice* was adopted in response to a request submitted by the National Telecommunications and Information Administration (NTIA) on November 9, 1987. NEXRADs are a joint development of the Department of Commerce, the Federal Aviation Administration (FAA) and the Air Force. These new, high-performance radars will replace existing, outdated weather radars currently operating in the meteorological aids service in the 2700-2900 MHz band.[2] NEXRADs will enhance efforts to collect weather data that will aid in monitoring and predicting adverse weather conditions.

3. NEXRADs will generally replace existing 2700-2900 MHz weather radars on a one-for-one basis. However, in its request for allocation NTIA advised that in certain geographic areas sufficient frequencies will not be available for NEXRAD systems in the 2700-2900 MHz band. NTIA identified the 2900-3000 MHz band as an alternative source of spectrum for NEXRAD installations that cannot be assigned spectrum in the 2700-2900 MHz band. The 2900-3000 MHz band is currently allocated for maritime radio navigation on a primary basis and radiolocation on a secondary basis for both Government and non-Government use.[3] NTIA proposed that this band also be allocated to the meteorological aids service and that operations in the meteorological aids service be limited to NEXRAD systems that cannot be accommodated in the 2700-2900 MHz band. NTIA stated that its analysis indicates that interference between NEXRADs and existing services in the 2900-3000 MHz band can be avoided through frequency coordination. NTIA estimated that no more than twenty-one of the almost 200 proposed NEXRAD installations will require use of frequencies in the 2900-3000 MHz band.[4] Thus, the Commission proposed that the Table of Frequency Allocations be amended by adopting the following footnote for the 2900-3000 MHz band:

US309

The band 2900-3000 MHz is also allocated on a primary basis to the Meteorological Aids Service. Operations in this service are limited to Government Next Generation Weather Radar (NEXRAD) systems where accommodation in the 2700-2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

DISCUSSION

4. There were no comments filed in response to the *Notice* in this proceeding. We continue to believe that the limited allocation of the 2900-3000 MHz band for NEXRAD operation requested by NTIA will serve the public interest. Providing for use of technology that improves weather prediction capabilities benefits the public in numerous ways. Weather prediction plays a particularly crucial role in connection with safe air travel, both commercial and military. Weather conditions are often a contributing factor in air travel accidents. NEXRADs will provide the ability to accurately track adverse weather systems, thereby allowing air traffic to follow safer routes. Moreover, our national defense forces will benefit from the improved weather information that will be provided by NEXRAD systems.

5. We also conclude that the proposed use of the 2900-3000 MHz band by NEXRAD systems will have little, if any, impact on existing services in this band. NTIA has indicated that only a limited number of NEXRAD installations will operate in the 2900-3000 MHz band. NTIA also stated that every attempt has been and will continue to be made to accommodate NEXRAD systems in the Government 2700-2900 MHz band prior to making NEXRAD assignments in the 2900-3000 MHz band. The 2900-3000 MHz band is used primarily by the U.S. Coast Guard to operate maritime radionavigation stations. This band is also used as one of the primary ship radar bands for radionavigation on a world-wide basis. In addition, numerous ships operate radionavigation radars and shipboard transponders to interrogate radiobeacons. However, NTIA indicates that the likelihood of interference between NEXRADs and existing systems can be minimized with proper site selection due to the characteristics of NEXRAD systems. Specifically, NEXRADs will use a one-degree pencil beam and a unique scanning sequence where the beam is pointed well above the horizon much of the time.

6. As we stated in the *Notice*, we believe that any potential interference problems can be resolved through the routine frequency coordination process of the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee (IRAC). The FAS frequency coordination process is used routinely to coordinate government and non-Government operations in numerous shared frequency bands. In addition, the Coast Guard, a user in the subject band, through the IRAC process concurs to the accommodation of NEXRADs in this band based upon the understanding that coast and ship radionavigation stations will continue to be afforded protection against interference by coordination of NEXRAD site locations and operating characteristics. This could be accomplished, for example, by ensuring that the NEXRAD antenna beam, including sidelobes, is directed away from any nearby shipping lanes or racon sites. Thus, we have confidence that review of NEXRAD planned installations by the FCC representative to FAS, by the Coast Guard and by other concerned Government agencies, will adequately safeguard against potential interference to non-Government licensees.

7. In light of the above, we find the co-primary frequency allocation requested by NTIA is in the public interest. Accordingly, we are amending the Table of Frequency Allocations and Part 80 of the Rules by adding the footnote proposed in the *Notice*, and changing Section 80.375 in accordance with the *Notice*.

FINAL REGULATORY FLEXIBILITY ANALYSIS

8. A regulatory flexibility analysis is not required in this case. NEXRADs operating in the 2900-3000 MHz will not have a significant impact on small entities. Therefore, we certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this proceeding. The Commission is adopting this *Report and Order* to allow NEXRADs to operate in the 2900-3000 MHz band on a co-primary basis when it is not feasible to do so in the 2700-2900 MHz band. No other significant alternatives have been identified.

ORDERING CLAUSES

9. Accordingly, *IT IS ORDERED* that pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r), Parts 2 and 80 of the Commission's Rules, 47 CFR Part 2 and Part 80 *ARE AMENDED* as set forth below. In addition, *IT IS ORDERED* that this Order will become effective **March 30, 1990.** *IT IS FURTHER ORDERED* that this proceeding *IS TERMINATED*.

RULE CHANGES

10. Parts 2 and 80 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by listing footnote US309 in column 5 for the 2900-3100 MHz band and by adding the text of footnote US309 to the list of footnotes at the end of the table as follows:

Section 2.106 *Table of Frequency Allocations*

United States table

Government Allocation (MHz)	Non-Government Allocation (MHz)
(4)	(5)
* * *	* * *
2900-3100	2900-3100
MARITIME RADIONAVIGATION	MARITIME RADIONAVIGATION
772 774 775	772 774 775
METEOROLOGICAL AIDS	Radiolocation
	US44 US309
US309	
Radiolocation	
US44	
* * *	* * *

* * * * *

United States (US) Footnotes

* * * * *

US309

The band 2900-3000 MHz is also allocated on a primary basis to the Meteorological Aids Service. Operations in this service are limited to Government Next Generation Weather Radar (NEXRAD) systems where accommodation in the 2700-2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

B. PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation in Part 80 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.375 paragraph (d) (2)(ii) is revised to read as follows:

Section 80.375 Radiodetermination Frequencies.

* * * * *

(d) Radiodetermination frequency bands above 2400 MHz.

(2) * * *

(ii) The use of the 2900-3100 MHz, 5470-5650 MHz and 9300-9500 MHz bands for radiolocation must not cause harmful interference to the radionavigation and Government radiolocation services. Additionally, the use of the 2900-3000 MHz band for radiolocation must not cause harmful interference to the Government meteorological aids service;

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, Gen. Docket No. 88-550, 3 FCC Rcd 70, 74 (January 1988).

[2] Some of these existing weather radars began operation in the late 1950's.

[3] The U.S. Coast Guard operates maritime radionavigation stations which include numerous radiobeacon (racon) stations in the 2900-3100 MHz band as part of the national maritime safety system. In addition our records indicate there are about 49 non-Government maritime radionavigation stations assigned in the 2900-3100 MHz band on a primary basis. Also, this band is used as one of the primary ship radar bands for radionavigation purposes on a world-wide basis. There are also 13 secondary radiolocation stations operating in this band. Our records also indicate that one radiolocation test station and one aviation station operate in the 2900-3000 MHz band.

[4] In the *Notice*, the Commission tentatively concluded that the requested allocation for NEXRAD would be in the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 84-468

In the Matter of

Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, to revise the accounting provision for cost of removal, gross salvage, and reusable plant.

ORDER

Adopted: January 25, 1990; Released: February 13, 1990

By the Commission:

I. BACKGROUND

1. On May 16, 1984, we released a Notice of Inquiry (NOI) in this Docket to solicit comments on revising the accounting prescribed in the Uniform System of Accounts for Class A and Class B Telephone Companies (47 C.F.R. Part 31) for gross salvage value, cost of removal, and reusable material related to plant in service.[1] Respondents were asked to comment on specific proposals made by the Telecommunications Industry Advisory Group (TIAG)[2] and the National Association of Regulatory Utility Commissioners (NARUC) for the treatment of the cost of removal, gross salvage value and reusable material as well as the tax consequences and revenue impacts of the proposals. However, the responses we received to the NOI did not provide sufficient data to assess the impact of any of the recommended changes. Further, the states commenting in response to the NOI strongly opposed the TIAG's recommendations. Because of the strong regulatory opposition to the TIAG's recommendations on the depreciation accounting issues, and because of the lack of sufficient information to assess the impact of the change, we decided not to pursue these matters while Part 31 remained in effect.

2. In the *Report and Order* [3] that established the new Uniform System of Accounts in Part 32 of our regulations, we decided not to adopt any changes to the accounting treatment of cost of removal, gross salvage value, and reusable material.[4] However, the *Report and Order* contained no clause terminating this proceeding. We are issuing this Order to officially terminate the proceedings in this Docket.

II. ORDERING CLAUSE

3. Accordingly, IT IS ORDERED, That, under the authority contained in Sections 4(i), 4(j) and 220 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 220, this Docket IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, to revise the accounting provisions for cost of removal, gross salvage, and reusable plant, (CC Docket No. 84-468), Notice of Inquiry, FCC 84-199 (released May 16, 1984).

[2] The TIAG was a Federal Advisory Committee created by the Commission for the purpose of developing and recommending a new Uniform System of Accounts.

[3] Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 F.R. 24745, July 8, 1986 and 51 F.R. 43493, December 2, 1986, (*USOA Order*) *recon. denied in part and granted in part*, 2 FCC Rcd 1086 (1987).

[4] *USOA Order, supra*, at para. 156.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-334

In re Applications of

62 BROADCASTING, INC. File No. BPCT-860303KH

AIDA BARRERA File No. BPCT-860422KN

For a construction permit
for a New Television
Station at Killeen, Texas

ORDER

Adopted: January 31, 1990; Released: February 13, 1990

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF Television Station on channel 62 at Killeen, Texas, filed by 62 Broadcasting, Inc. and Aida Barrera. In a Decision, 4 FCC Rcd 1768 (1989), the Board granted 62 Broadcasting's application. Now before the Commission are Applications for Review filed March 21, 1989 by Barrera and Oppositions filed April 5, 1989 by the Mass Media Bureau and by 62 Broadcasting, Inc.

2 ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), both of the Applications for Review filed March 21, 1989 by Aida Barrera ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-37

In re Applications of

Marion R. Williams (hereafter "Williams") File No. BPH-880323MM

Dunes Broadcasting, Inc. (hereafter "Dunes") File No. BPH-880324MT

For Construction Permit
for a New FM Station
in Buchanan, Michigan
Channel 256A (99.1 MHz)

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Williams*. In response to Section III of FCC Form 301 Williams has certified that he does not have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months without revenue. Accordingly, a financial issue will be specified.

3. Williams proposes to side-mount on an existing structure. The tower data submitted in Section V-B of FCC Form 301 (October 1986) lists the overall height above ground level (AGL) of the existing tower at 159 meters and the overall height above mean sea level (AMSL) of the tower as 388 meters. This data is inconsistent with that contained in the Commission's records which list the AGL as 152.4 meters and the AMSL as 381 meters. Because Williams clearly proposes to locate on an existing tower licensed to a Commission licensee, and because specific reference is made to this tower in his application, the Commission could, "drawing on the application as a whole", confidently verify that the applicant does indeed propose to utilize the existing tower structure as found in the Commission's files. Accordingly, Williams' application is found to be acceptable for filing; however, Williams will be required to file a clarifying amendment to show the actual height of the existing tower structure with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, as we do not have FAA clearance for the tower height presently proposed by Williams, an air hazard issue will be specified.

4. *Dunes*. Dunes petitioned for leave to amend its application on November 22, 1989. The accompanying amendment was filed after June 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Williams whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Williams would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Williams shall submit an amendment in accordance with paragraph 3 hereinabove.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Dunes IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review Concerning
Liability of Oro Spanish Broadcasting
Company Inc., Licensee of Station
KIQI(AM), San Francisco, California

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1990; Released: February 13, 1990

By the Commission:

1. The Commission has before it for consideration: (a) a Notice of Apparent Liability (NAL), dated June 7, 1989, imposing a forfeiture in the amount of nine thousand three hundred dollars ($9,300.00) against Oro Spanish Broadcasting Company, Inc. (Oro), licensee of KIQI(AM), San Francisco, California; (b) a Forfeiture Order, dated August 11, 1989, reducing the forfeiture amount to nine thousand dollars ($9.000.00)[1] and (c) an Application for Review, filed September 7, 1989, by Oro, requesting that the forfeiture be rescinded.

2. As explained more fully in the NAL, the forfeiture was issued against Oro after an April 7, 1989, inspection by a member of the San Francisco office of the Field Operations Bureau (FOB) found the following violations: (a) the Public Inspection File was not readily available for inspection upon request by the inspecting officer in willful violation of Section 73.3526(d) of the Commission's Rules ($300.00); (b) daily logging entries were made suggesting that the tower lights were routinely turned on and off when the lights were, in fact, not functioning in repeated violation of Sections 17.47(a)(1) and (2), and 17.49 ($1,000.00); and (c) the station's tower lights were extinguished as confirmed by observations by FOB personnel on April 3, 4, and 5, 1989, at approximately 10:00 p.m. and on June 5, 1989, at 9:00 p.m. in repeated violation of Sections 73.1213(a) and (b), 17.48 and 17.56(a) ($8.000.00). The August 11, 1989, Forfeiture Order deleted the Public Inspection File forfeiture, reducing the total forfeiture to $9,000.00.

3. Oro, in its Application for Review, claims the logging violations are "wholly unwarranted." Oro states that "[l]ogs are no longer required by the Commission Rules," but that the station continued to keep logs to contribute to good engineering practices. Oro states that the words "on/off" were written next to a dated operator's signature on the logging form line reading "tower lights" because a previous logging form had "on:off" printed on the "tower lights" line. Licensee avers this was done by the operators merely to make the new logging form conform to the old, and not as an effort to represent that the lights had been turned on or off.

4. Oro claims that KIQI's towers do not need to be lit because they are short and "shielded" by other, nearby towers. Oro presents three additional arguments for failing to light its towers in order to counter the forfeiture. First, the licensee states it discussed the matter with the former station owner and "it was his view that lighting was not required on the Station's towers." Second, Oro avers that the Federal Aviation Administration (FAA) was on notice that the station's towers were not lit. Finally, Oro argues that the FAA has since determined that the towers do not need to be lit.

5. To support its assertion that the FAA had notice that the towers were unlit, Oro presents a statement (Exhibit C, licensee's response) from the station's Chief Engineer, John Scherer. Mr. Scherer states that in 1984 he received a phone call from an official of the Oakland FAA Flight Service station regarding the station's three towers. Mr. Scherer recalls telling the FAA official that the tower lights were not working and would be out indefinitely. In reply, the official allegedly told Mr. Scherer to inform the FAA "if and when the lights are working again." The statement also recounts a 1987 telephone inquiry from the FAA asking whether the tower lights were working. Mr. Scherer states that he told the FAA official that the lights had been off for quite some time and that the FAA had been notified.

6. As to its third argument, Oro states "the FAA has now formally confirmed that the towers are not required to be lighted." As evidence of this assertion, Oro presents a July 2, 1989, letter from Karen McDonald of the FAA (Exhibit B, licensee's response). The letter states that it was written in reply to a request from KIQI for an FAA determination that obstruction marking and lighting is not necessary for KIQI's towers. The FAA letter states, in part: "It has therefore been concluded that elimination of obstruction marking and lighting for the KIQI towers would not cause any known adverse effect upon aeronautical activity."

7. Oro adds two general arguments to support its request for a recision. First, Oro asserts that KIQI is a "stand alone" AM station, and it is Commission policy to provide as much assistance as possible to AM stations. Second, Oro claims that the station was picked as an "example" to warn other licensees. In support, licensee provides a copy of a July 17, 1989, press notice which, in addition to announcing KIQI's forfeiture, warns licensees that "Local FCC offices will continue their close scrutiny of towers. This is a safety-of-life issue which FCC licensees must recognize and become more sensitive to."

8. Oro states that logs are no longer required by the Commission's rules. Although program logs are no longer required, Section 73.1800 requires licensees to maintain station logs containing accurate representations of station operations.[2] With regard to tower lighting, Sections 17.47(a)(1) and (2) of the Commission's Rules impose a duty to inspect and maintain the tower lighting, and Section 17.49 requires "entries in the station record" in the event of improper station lighting. Oro's logging entries consisted of the station engineer's signature next to the handwritten words "on/off" on the "tower lights" line of the log. Although these entries could be interpreted as false representations that the lights were regularly turned on and off, the significance of these entries is not entirely clear from the face of the logs. Oro asserts that the words "on/off" were added to the station's logging forms by the night operator in the mistaken belief that it was necessary

to make them conform to the prior forms used by the station on which the words "on" and "off" were printed, leaving space, it appears, for the entry of the times at which the lights were turned on and off. Oro further asserts that there was no intent to make false representations since the tower lights were never on and the entries were not meant to indicate otherwise. Indeed, no times were entered in the spaces next to the "on" and "off" notations. In light of this ambiguity, the forfeiture of $1,000.00 for false logging entries is hereby rescinded.

9. Section 73.1213 of the Commission's Rules requires that antenna lighting be maintained in accordance with Part 17. Section 17.21(a) of the Commission's Rules requires that towers 200 feet above the ground be lighted. [3] Section 17.21(b) permits the Commission to modify this requirement upon a showing by the applicant that safety of air navigation would not be compromised. Oro's claim that the towers are short and shielded by other towers does not negate this duty. KIQI's towers are 205 and 217 feet in height. Oro's assertion that the former licensee had the view that such lighting was not required does not relieve the current licensee of the duty to light the towers or seek a modification of the duty. Section 17.48 requires notification of extinguishment or improper functioning of lights and Section 17.56(a) requires replacing or repairing lights, automatic indicators, automatic control and alarm systems as soon as possible. Licensee's decision to ignore these in reliance on the opinion of the station's former licensee does not warrant a reduction or recision of the forfeiture.

10. Nor is Oro relieved from the rule requirements because Mr. Scherer, the station's Chief Engineer, received a call from an FAA official and mentioned that the tower lights were out. Oro never provided the notification required by Section 17.48 and did not seek a waiver of the repair requirements set out in Section 17.56(a).

11. Similarly, Oro's solicitation of an opinion letter from the FAA, after issuance of the NAL, stating that the elimination of KIQI's tower lighting would not have an adverse impact upon aeronautical activity does not establish that the station was not required to light its towers. The FAA letter may form the basis for a request for modification of the requirement pursuant to Section 17.21(b) of the Commission's Rules with respect to future conduct. It does nothing, however, to relieve the licensee of its obligation to observe the Commission's rules unless and until it receives such relief.

12. As to its remaining arguments, while we reiterate our policy of support for AM stations, this policy does not relieve such stations of their obligation to comply with the Commission's Rules. Finally, licensee's belief that KIQI's forfeiture is unjust because the announcement of the action was accompanied by a warning to other licensees does not warrant either a reduction or recision of the forfeiture. The indication in the press release that the Commission considers unlit towers a serious safety related problem is neither a novel proposition nor evidence that this licensee was improperly singled out for punishment.

13. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed September 7, 1989, by Oro Spanish Broadcasting Co., Inc., licensee of Station KIQI(AM), San Francisco, California, IS GRANTED, IN PART and DENIED, IN PART. 47 C.F.R. Section 1.115(g).

14. IT IS FURTHER ORDERED That Oro Spanish Broadcasting Co., Inc., licensee of Station KIQI(AM), San Francisco, California, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of eight thousand dollars ($8,000.00) for repeated violations of Section 73.1213(a) and (b), 17.48 and 17.56(a) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In a Payment Demand letter, dated September 15, 1989, the San Francisco office incorrectly referred to the forfeiture amount as being $8,000.00. By letter dated October 31, 1989, that office advised the licensee that the correct forfeiture amount is $9,000.00.

[2] Section 73.1800(a) of the Commission's Rules specifically states:

> "All entries, whether required or not by the provisions of this part, must accurately reflect the station operation. Any employee making a log entry shall sign the log, thereby attesting to the fact that the entry, or any correction or addition thereto, is an accurate representation of what transpired."

[3] Section 17.21 states:

> Antenna structures shall be painted and lighted when: (a) They exceed 60.96 meters (200 feet) in height above the ground or they require special aeronautical study. (b) The Commission may modify the above requirement for painting and/or lighting of antenna structures, when it is shown by the applicant that the absence of such marking would not impair the safety of air navigation, or that a lesser marking requirement would insure the safety thereof.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-29

In re Applications of

RADIO SOUTH BURLINGTON, INC. (hereafter "Radio South")	File No. BPH-880126MJ
GARRISON CITY BROADCASTING, INC. (hereafter "Garrison")	File No. BPH-880126NY
SEACOAST PUBLIC RADIO, INC. (hereafter "Seacoast")	File No. BPED-880126OS

For Construction Permit
for a New FM Station on Channel 254A (98.7 MHz)
in Somersworth, New Hampshire

HEARING DESIGNATION ORDER

Adopted: January 19, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Radio South, Garrison, and Seacoast would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Radio South	August 23, 1988; January 3, 1989
Seacoast	June 7, 1988

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Radio South, Garrison, and Seacoast would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Radio South and Seacoast ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-35

In re Applications of

DAWN CORINE RANGEL (hereafter "Rangel")	File No. BPH-880219MB
MORRO BAY INVESTMENT CORP. (hereafter "MBI")	File No. BPH-880219ME
GFR ENTERPRISES, INC. (hereafter "GFR")	File No. BPH-880219MH
MORRO BAY BROADCASTERS (hereafter "MBB")	File No. BPH-880219MI
S & D ENTERPRISES (hereafter "S & D")	File No. BPH-880219MR
LINDA WARE d/b/a MORRO BAY BROADCASTING (hereafter "Morro Bay")	File No. BPH-880219MS

For Construction Permit
for a New FM Station on Channel 259A
(99.7 MHz) in Morro Bay, California

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rangel.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Rangel has filed such statement, it is deficient. Rangel has not listed any specific local recruitment sources for minorities. Accordingly, Rangel will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. MBI has not completed Item 4 correctly. MBI's application gives a post office box number as the residence address for one of its principals, Larry Kelley. Accordingly, MBI must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *GFR.* Information before the Commission indicates that GFR was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question GFR's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against GFR in this proceeding.

5. GFR petitioned for leave to amend its application on May 30, 1989. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, to-

gether with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of GFR.

2. To determine whether GFR's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether GFR possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Rangel shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That MBI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by GFR IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-38

In re Applications of

McDowell Communications Associates A Limited Partnership (hereafter "MCALP") File No. BPH-880210MJ

James B. Childress and Suzanne C. Childress d/b/a Geyser Broadcasting Company (hereafter "Geyser") File No. BPH-880217MR

For Construction Permit
for a New FM Station on Channel 282A
in Old Fort, North Carolina

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. Section II, item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Geyser has not completed item 4(a) correctly. The Geyser application gives a Post Office Box number as the residence address of Suzanne C. Childress. Accordingly, Geyser must submit an amendment which gives all the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Geyser shall submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On July 27, 1989, MCALP and McDowell Broadcasting Company ("MBC") filed a Joint Request for Approval of Settlement Agreement. Pursuant to the January 23, 1990 grant of this Agreement, the application of MBC was dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-124

Application for Authorization under Section 214 of the Communications Act of 1934, as amended, to Acquire and Activate Capacity in High Capacity Digital Submarine Cable Systems Between Spain and Italy and Between Italy, Greece, Turkey and Israel

ORDER AND AUTHORIZATION

Adopted: February 8, 1990; **Released: February 13, 1990**

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed by American Telephone and Telegraph Company (AT&T) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to: (1) acquire capacity in the high capacity digital submarine MAT-2 Cable System between Spain and Italy; (2) acquire capacity in the high capacity digital submarine EMOS-1 Cable System between Italy, Greece, Turkey and Israel; (3) acquire by lease such connecting facilities as may be necessary to extend the capacity to be acquired in the MAT-2 to Yugoslavia; and (4) activate and operate such capacity for the provision of its authorized services to specified countries. The application was placed on the Commission's public notice and no comments were received.

2. The MAT-2 Cable System will extend between landing points at the cable stations at Estepona, Spain; Mallorca, Spain; and Palermo, Italy. The MAT-2 Cable System is divided into four segments. Segments A through C are, respectively, the cable stations in Palermo, Mallorca and Estepona. Segment D consists of the whole of the submarine cable system provided between and among, and including the system interfaces at Segments A, B and C. Segment D is comprised of two subsegments: Subsegment D1 is that part of Segment D between the system interfaces at the cable stations in Palermo and Mallorca while Subsegment D2 is that part of Segment D between the system interfaces at the cable stations in Mallorca and Estepona. Digital terrestrial fiber optic facilities will interconnect Estepona with Conil, the landing point of the TAT-9 Cable System on the Atlantic coast of Spain. SUBMARCOM has been selected as the supplier of the MAT-2 Cable System. AT&T will be a subcontractor for Subsegment D-2 and will provide the repeaters, power equipment and engineering for that Subsegment. The line system will operate at a bit rate of 560 Mbits/s on a single mode optical fiber at a wavelength of 1.55 microns. Capacity will be provided on one fiber pair in a 560 Mbit/s stream containing 7,680 Minimum Assignable Units of Ownership (MAUOs).[1] For voice services, digital circuit multiplication systems (DCMS) can be employed to derive nominally 150 virtual voice paths from a 2.048 Mbit/s stream consisting of 30 MAUOs.

3. The Construction and Maintenance Agreement (C&MA) for the MAT-2 Cable System became effective on March 18, 1987. Subsequently, the C&MA for MAT-2 was amended on December 11, 1987 and May 30, 1989.[2] The MAT-2 Cable System is scheduled to go into service in October 1991. The projected cost of the system is $71.8 million, which does not include interest during construction. The costs of the system will be allocated between the parties in accordance with their respective ownership shares. AT&T's total cost for acquisition of capacity in the MAT-2 Cable System will be approximately $4.2 million, plus $1.05 million for interest during construction. AT&T will activate capacity jointly with its correspondents in the MAT-2 Cable System as follows: Italy--462 MAUOs; Turkey--100 MAUOs; and Yugoslavia--30 MAUOs. The approximate cost per half-MAUO in MAT-2 is estimated at $7,130.

4. The EMOS-1 Cable System is divided into five segments. Segments A through D are, respectively, the cable stations at Palermo, Italy; Lechaina, Greece; Marmaris, Turkey; and Tel Aviv, Israel. Segment E includes the whole of the submarine cable system provided between and among the system interfaces at Segments A, B, C and D, including the interfaces. Segment E is divided into five subsegments: Subsegment E-1 is that part of Segment E between the Branching Unit BU-1, including the Branching Unit, and the nominal 140 Mbit/s digital input/output ports at the Palermo Cable Station; Subsegment E-2 is that part of Segment E between BU-1 and the nominal 140 Mbit/s digital input/output ports at the Lechaina Cable Station; Subsegment E-3 is that part of Segment E between BU-1 and BU-2, including BU-2; Subsegment E-4 is that part of Segment E between BU-2 and the nominal 140 Mbit/s digital input/output ports at the Marmaris Cable Station; and Subsegment E-5 is that part of Segment E between BU-2 and the nominal 140 Mbit/s digital input/output ports at the Tel Aviv Cable Station.

5. SUBMARCOM has been selected as the supplier of the EMOS-1 Cable System. EMOS-1 will contain from one to three working fiber pairs, each operating at 280 Mbit/s on a single mode optical fiber at a wavelength of 1.3 microns. Subsegment E-1 shall contain three fiber pairs; Subsegment E-3 shall contain two fiber pairs and Subsegment E-2, E-4 and E-5 shall each contain one fiber pair. The capacity on each fiber pair is provided in two 140 Mbit/s streams, with each stream containing 1,920 MAUOs. The capacity of Segment E will be 3,840 MAUOs per fiber pair for a total capacity of 11,520 MAUOs. For voice services, DCMS can be employed to derive nominally 150 virtual voice paths from a 2.048 Mbit/s stream consisting of 30 MAUOs.

6. The C&MA for the EMOS-1 Cable System was signed on February 10, 1988. [3] The EMOS-1 Cable System is scheduled to go into service in July 1990. The current projected cost of the EMOS-1 Cable System is approximately $107.5 million, which does not include interest during construction. Under the terms of the C&MA, the co-owners will bear the capital, operating and maintenance costs of EMOS-1 Cable System in accordance with Attachment F, Schedules B-2 and D. AT&T's share of the $107.5 million estimated capital cost for the

EMOS-1 system will be approximately 10.41 percent, $11.2 million, plus $2.24 million for interest during construction. AT&T will activate capacity jointly with its correspondents in EMOS-1 Cable System as follows: Greece--49 MAUOs; Turkey--145 MAUOs; and Israel--630 MAUOs. The approximate cost per half-MAUO in EMOS-1 is estimated as follows: Italy-Greece, $3,700; Italy-Turkey, $12,400; and Italy-Israel, $14,900.

7. AT&T states that there will be sufficient capacity in the initial years of service of the MAT-2 and EMOS-1 Cable Systems to accommodate the needs of other U.S. carriers and countries that are not co-owners but have, or will have in future, a need to use the MAT-2 and EMOS-1 Cable Systems. The C&MA for each cable system contains a provision permitting the assignment of capacity in the MAT-2 and EMOS-1 cable system between co-owners and others.

8. In addition to the acquisition of capacity in the MAT-2 and EMOS-1 Cable Systems, AT&T seeks authority to acquire by lease such connecting facilities as may be required to extend the capacity in the MAT-2 Cable System to Yugoslavia. AT&T states that activations of satellite circuits in the AOR for the 1990-1995 time period will be the subject of a separate application. Similarly, AT&T states that it will separately seek authority to acquire and activate capacity in other connecting cable systems on an indefeasible right of user (IRU) or ownership basis, and for the acquisition and use of DCMS equipment for the MAT-2 and EMOS-1.

9. Upon consideration of the instant application, we conclude that its grant is required by the public convenience and necessity. In authorizing AT&T and other U.S. international service carriers to participate in the construction and operation of the TAT-9 Cable System, the Commission determined that the TAT-9 Cable System, along with the proposed MAT-2 and EMOS-1 cables, would provide digital connectivity and direct, secure, transmission channels to Mediterranean basin countries.[4] Thus, the Commission clearly contemplated that U.S. carrier owners of the TAT-9 Cable System would also acquire capacity in the MAT-2 and EMOS-1 Cable Systems in order to provide their regularly authorized services.

10. Accordingly, IT IS ORDERED that the application of AT&T, File No. I-T-C-89-124, IS GRANTED and AT&T[5] is authorized to:

(a) acquire capacity in the MAT-2 Cable System between Spain and Italy as specified in paragraph 3;

(b) acquire capacity in the EMOS-1 Cable System between Italy, Greece, Turkey and Israel as specified in paragraph 6;

(c) acquire by lease necessary connecting and transiting facilities to extend MAT-2 and EMOS-1 capacities authorized herein; and

(d) activate and operate such capacity for AT&T's authorized services between the U.S. and Italy, Turkey, Yugoslavia, Greece and Israel.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] A MAUO is an equivalent voice channel operating at 64,000 usable bits per second and an additional 9,684.656 bits per second required for multiplexing.

[2] The parties to the C&MA for MAT-2 and their respective ownership shares of Segment D are: Azienda di Stato per i Servizi Telefonici (Italy)--42.46168%; Italcable, Servizi Cablografici Radiotelegrafici e Radioelettrici S.P.A. (Italy)--19.88305%; Compania Telefonica Nacional de Espana (Spain)--16.82355%; AT&T--5.88012%; British Telecommunications plc.--7.44947%; MCI International, Inc.--0.89394%; Bord Telecom Eireann (Ireland)--0.35757%; Teleglobe Canada--1.84747%; US Sprint Communications Company--0.29798%; Community of Yugoslav Posts, Telegraphs and Telephones--0.58840%; General Directorate of Turkish PTT--2.21120%; Hellenic Telecommunications Organization, S.A. (OTE, Greece)--1.10691%; Telefonos De Mexico, SA DE CV--0.09933%; and Philippine Long Distance Telephone Company Inc.--0.09933%.

[3] The parties to the C&MA for EMOS-1 and their respective ownership shares of Segment E are: ASST, Italian PTT--12.20050%; BEZEQ/MOCI, Israel--21.89272%; British Telecom--2.73839; Deutsche Bundespost--11.16886%; Societe France Cables et Radio--5.94993%; France Telecom--3.82585%; Italcable, Italy--0.64452%; MCII--0.51286%; OTE, Greece--6.97201%; Swiss PTT--2.36283%; Telefonica, Spain--1.32974%; Transpacific/AT&T--10.41123%; Turkish PTT--18.75636%; and US Sprint--1.23420%.

[4] American Telephone and Telegraph Company, *et al.*, 4 FCC Rcd 1129, 1132 (1989).

[5] Transpacific Communications, Inc., a wholly-owned subsidiary of AT&T, will own that portion of Segment D of the MAT-2 Cable System and that portion of Segment E of the EMOS-1 Cable System allocable to capacity held for use by AT&T.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE AND WIRELESS COMMUNICATIONS INC. File No. I-T-C-90-011

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Switched Voice Services for the Provision of Switched Voice Services to Various International Points.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 8, 1990; Released: February 13, 1990

By the Chief, International Facilities Division:

1. On October 11, 1989, Cable and Wireless Communications, Inc. (C&W) filed with the Commission an application for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to resell the switched voice services set forth in AT&T's Tariff F.C.C. No. 1, US Sprint's Tariff F.C.C. Nos. 1 and 2, and MCI's Tariff F.C.C. No. 1 for the provision of switched voice services to Ghana, Guinea, Kiribati, Republic of Maldives, Mauritius, Nauru, Rwanda, Seychelles, Tonga, the U.S.S.R. and the Socialist Republic of Vietnam. C&W proposes to price such service offerings at or above an underlying carrier's rates, as specified in the above-referenced tariffs or any successor tariffs of the carrier that may include similar service offerings. AT&T filed comments in response to the application, and C&W replied. For the reasons stated below, we grant the application in part and deny it in part.

2. C&W is a common carrier authorized to provide switched voice services on a resale basis to numerous international points. C&W is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. *See Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (Com. Car. Bur. 1987). As a result, C&W is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies, 102 F.C.C. 2nd 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points.

3. As a dominant carrier in its provision of international common carrier services, C&W remains subject to traditional entry and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorizations must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorizations, or, as here, serve additional points set forth in the underlying carriers' tariffs but not specified in the resellers' existing Section 214 authorizations.

4. In the instant application, C&W seeks authority to resell the switched voice services set forth in the tariffs of each of the three underlying carriers to all eleven international points listed above in paragraph 1. However, these eleven points are not served by all three carriers. US Sprint does not serve the Seychelles.[1] No carrier currently serves Vietnam.[2] We will not authorize C&W to resell the services of an underlying tariff to points that currently are not served by the underlying carrier. With respect to Vietnam, there are additional considerations. As AT&T comments, the Department of Treasury may require any reseller of service to Vietnam to receive a license pursuant to 31 C.F.R. Section 500. Given our disposition of the instant application and the current unavailability of any underlying direct service to Vietnam, the question of the applicability of 31 C.F.R. Section 500 to resellers need not be addressed at this time. This question would become relevant should any underlying carrier receive authority to provide service to Vietnam and C&W or other entity seek to resell such service.

5. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by C&W between the United States and the points listed in Appendix A to this decision.

6. Accordingly, IT IS ORDERED that the application of C&W, File No. I-T-C-90-011, IS GRANTED IN PART and DENIED IN PART, and C&W is authorized to provide international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2 to Ghana, Guinea, Kiribati, Republic of Maldives, Mauritius, Nauru, Rwanda, Seychelles, Tonga and the U.S.S.R., in MCI's Tariff F.C.C. No. 1 to Ghana, Guinea, Kiribati, Republic of Maldives, Mauritius, Nauru, Rwanda, Seychelles, Tonga and the U.S.S.R.; and in US Sprint's Tariff F.C.C. Nos. 1 and 2 to Ghana, Guinea, Kiribati, Republic of Maldives, Mauritius, Nauru, Rwanda, Tonga and the U.S.S.R. This Section 214 authorization is limited to C&W's resale of the international switched voice services set forth in the above-referenced tariffs of AT&T, MCI and US Sprint. It does not provide C&W with the authority to resell services set forth in any successor tariffs of AT&T, MCI or US Sprint. Thus, should C&W seek to resell the services of AT&T, MCI or US Sprint as set forth in any successor tariffs of these carriers, it must separately request authority to do so.

7. IT IS FURTHER ORDERED that C&W SHALL FILE any operating agreement entered into by itself or its parent/affiliate with its correspondents within 30 days of its execution.

8. IT IS FURTHER ORDERED that C&W SHALL FILE quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries authorized in para. 6 individually within 90 days from the end of each calendar quarter.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this decision.

10. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

11. IT IS FURTHER ORDERED that C&W SHALL FILE annual traffic and revenue reports as provided in CC Docket 86-494 concerning traffic originating or terminating within the United States.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Ghana
Guinea
Kiribati
Republic of Maldives
Mauritius
Nauru
Rwanda
Seychelles
Tonga
U.S.S.R.

FOOTNOTES

[1] *See* US Sprint Tariff Nos. 1 and 2.

[2] U.S. Department of Treasury regulations prohibit transactions with designated foreign countries, including Vietnam, absent specific authorization from the Department of Treasury. C&W states that it anticipated AT&T would receive such authorization before the Commission acted on the instant application. C&W asks the Commission to conditionally authorize its service to Vietnam effective on the date that AT&T, MCI or US Sprint receives authorization to provide direct service to that country.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 8, 1990

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE

A meeting of the Advisory Committee on Advanced Television Service will be held on:

March 21, 1990
2:00 P.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Approval of Minutes of the Last Meeting
3. Remarks by FCC Chairman Alfred Sikes
4. Reports of the Subcommittees
5. Report of Testing Laboratories
6. Draft of Third Interim Report
7. Testing Schedule
8. Discussion of Aspect Ratio
9. Financial Report
10. Future Work Plans
11. Other Business
12. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Advisory Committee Chairman.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or William Hassinger at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-42

In re Applications of

ROBERT MCCLANATHAN AND LESTER SPILLANE (hereafter "McClanathan/Spillane") File No. BPH - 880126MX

DONALD L. MCCOUN (hereafter "McCoun") File No. BPH - 880128MG

BANKS FM, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "BFM") File No. BPH - 880128MI

WAYNE DURFEE (hereafter "Durfee") File No. BPH - 880128MN

NORTHWEST RADIO ASSOCIATES, INC. (hereafter "Northwest") File No. BPH - 880128MQ

BANKS PACIFIC BROADCASTING, INC. (hereafter "BPB") File No. BPH - 880128MT

ROBERT ANTHONY FOGAL d/b/a COMMON GROUND BROADCASTING (hereafter "Common Ground") File No. BPH - 880128MU

For Construction Permit for a New FM Station on Channel 298A in Banks, Oregon.

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Parke-Reyes Company ("Parke") has submitted a petition to dismiss an amendment filed by BFM on April 22, 1988 for the purpose of specifying a new transmitter site. Parke was also an applicant for the Banks, Oregon allocation; however, Parke's application was returned by staff letter dated September 23, 1988 as not acceptable for filing. At the time that Parke filed the petition to dismiss the subject amendment, its application had not yet been returned. Parke requests that BFM's amendment to change transmitter site be disallowed because the amendment was filed after the time period set out in 47 C.F.R. § 73.3522(a)(6) during which amendments may be filed as of right, without the requisite good cause showing. *See* 47 C.F.R. § 73.3522(a)(6). Moreover, Parke argues that BFM did not have the requisite assurance that the site originally specified in its application would be available; therefore, BFM should not be allowed to amend its application in order to ameliorate the misrepresentation made in its application as originally filed. In response, BFM contends that Parke's motion to dismiss is procedurally defective: first, because the motion was filed four months after public notice of BFM's filing of the subject amendment; and second, because the motion is a thinly masked pre-designation petition to specify issues which can no longer be recognized in light of the Commission's decision to delete issue pleading in pending cases. *See Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979). Moreover, BFM responds in opposition that it had the requisite reasonable assurance that the originally specified transmitter site would be available, as defined by Commission precedent.

3. Parke is no longer a party to this proceeding, as its application has been dismissed and no request for reconsideration of the dismissal was filed within the period specified by 47 C.F.R. § 1.106. Moreover, Parke's pleading captioned "Petition to Dismiss," was filed prior to the release of public notice inviting petitions to deny. *See* 47 C.F.R. § 73.3573(f)(2); *Report and Order* in Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). However, Parke was a party at the time the motion to dismiss was filed, and we will consider the pleading as a petition to deny, pursuant to 47 U.S.C. § 309(d)(1). *See Petition for Rule Making to Establish Standards for Determining Standing of a Party to Petition to Deny Broadcast Applications*, 82 FCC 2d 89, 93-96 (1980). *See also* 47 C.F.R. § 73.3584. As an initial matter, we agree with BFM that Parke erroneously characterizes BFM's amendment as late filed. Commission rules provide that amendments which address the acceptability or grantability of an application for FM facilities may be filed as a matter of right any time prior to the expiration of the 30 day period triggered by release of the Public Notice announcing that the application has been accepted for tender. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936, 19,941 (1985), *recon. denied*, 50 Fed. Reg. 43,157 (1985). *See also*, 47 C.F.R. § 73.3522(a)(6). The Commission released the public notice accepting BFM's application for tender on March 22, 1988. Pursuant to 47 C.F.R. § 1.4(b), notice is considered to have been released for purposes of computation of time at 3:00 p.m. on March 23, 1988, and March 24, 1988 is the first day counted in determining the period during which an amendment may be filed as of right. BFM filed the subject amendment on April 22, 1988, the thirtieth day after March 24, 1988 and the last day on which such an amendment could be filed as of right. Therefore, BFM legitimately changed its transmitter site within the period allowed in the Commission's rules. We will consider, however, whether BFM made misrepresentations in its application concerning the availability of the site originally specified.

4. As a threshold matter, 47 U.S.C. § 309(d) requires that a petition to deny demonstrate that a grant of the application against which the petition is filed would be

inconsistent with the public interest, convenience and necessity. *See, e.g., Astroline Communications Company*, 857 F.2d 1556 (D.C. Cir. 1988). The Commission determines whether the petition satisfies this threshold requirement on the basis of the petitioner's allegations alone and must proceed "on the assumption that the specific facts set forth [in the affidavits supporting the petition] are true." *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission determines that the petition satisfies this threshold sufficiency standard, the Commission next determines whether the pleadings (or other matters which it may officially notice) raise a substantial and material question of fact. *See Astroline*, 857 F.2d at 1561. Assuming the validity of Parke's allegations, we conclude that Parke's pleading makes a *prima facie* showing that BFM made misrepresentations to the Commission in its application as originally filed that it secured the requisite assurance of transmitter site availability from Cliff Ebert. Parke's petition is accompanied by Cliff Ebert's statement, made under penalty of perjury, which stipulates that BFM had contacted him about using the site for an FM transmitter but that he was not authorized to issue such assurance, nor was any such assurance issued. The site specified was a former lookout station owned by the Oregon Department of Forestry. Ebert states that he referred BFM to Oregon rules and procedures governing requests for use of such sites. Because BFM's application, as originally filed, includes a certification that it obtained reasonable assurance of site availability from Mr. Ebert, Parke's allegations are a *prima facie* showing that grant of the subject application would be inconsistent with the public interest. With regard to the second prong of the standard used to determine the sufficiency of a petition to deny, we find that Parke's petition presents a substantial and material question of fact. BFM, in its opposition, alleges that its consulting engineer, D.C. Williams, contacted Mr. Ebert with respect to the availability of the originally proposed site. The opposition is accompanied by the affidavit of Mr. Williams which states that Mr. Ebert provided full information regarding the site and indicated that the site would be available for BFM's intended use. Mr. Williams' affidavit also states that Mr. Ebert did not provide any specifics regarding rules, regulations or procedures to be followed nor did Mr Ebert respond to his requests for necessary application forms. Mr. Williams asserts that he and Mr. Ebert specifically discussed rent to be paid for use of the site. Although the evidence presented by Parke has been specifically controverted by BFM, the totality of the evidence appears to be in equipose. Therefore, we believe an evidentiary hearing is justified on Parke's allegations of BFM's misrepresentations. Accordingly, Parke's petition, when considered as a petition to deny, will be granted to the extent indicated herein, and an appropriate issue will be specified against BFM.

5. *Northwest.* Information before the Commission indicates that Northwest was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Northwest's qualification to be a Commission licensee. Northwest amended its application on April 19, 1988 in order to indicate that its ownership structure had changed from a general partnership to a corporation. Northwest specified in the amendment that the corporation's non-voting shareholder is a general partnership, which is insulated by the corporate by-laws from the day-to-day operation of the corporation and any media properties the corporation may acquire. Although the interests of Northwest's non-voting shareholder apparently are not attributable under the standard set forth in the *Report and Order, Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable and Newspaper Entities*, 55 RR 2d 1465 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), the unresolved character issues are imputed to the applicant. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

6. *Other Matters.* In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396(A), the 5-Point Model EEO Program. The EEO Programs submitted by the listed applicants are incomplete or otherwise deficient in the manner described. Accordingly, the listed applicants will be required to file amended EEO Programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
McClanathan/Spillane, BFM	Failed to identify specific sources of recruitment specializing in women candidates

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Pursuant to 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
McCoun	January 30, 1989
Northwest	May 30, 1989, June 6, 1989, June 27, 1989.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether BFM made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission with respect to the assurances it secured, if any, that its originally specified transmitter site would be available.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Northwest

3. To determine whether Northwest's organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 2 and 3 above, whether Northwest possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That for the reasons stated in paragraphs 2-4 above, the petition to dismiss filed by Parke against the April 22, 1988 amendment to BFM's application, when considered as a petition to deny IS HEREBY GRANTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by McCoun and Northwest ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That McClanathan/Spillane and BFM shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2), as amended, and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-41

In re Applications of

Laurel Broadcasting Company, Inc.	File No. BPH-880217MK
Blaine R. Handerhan and Eugene Picarella, Jr., d/b/a H & P Communications, Ltd. (hereafter "H & P")	File No. BPH-880217MT
Roger and Sandra A. Snyder	File No. BPH-880217MV
Mt. Carmel Partnership	File No. BPH-880217NI

For Construction Permit
for a New FM Station on Channel 259A
in Mt. Carmel, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. H & P petitioned for leave to amend its application on March 30, 1989 and April 10, 1989.[1] The accompanying amendment was filed after June 6, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. Data submitted by the applicants indicate there would be significant difference in the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by H & P ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The April 10, 1989 amendment is the executed March 30 amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-43

In re Applications of

SUNSHINE BROADCASTING INC. (hereafter "Sunshine") File No. BPH-870625MI

HARTSVILLE BROADCASTING CO., INC. (hereafter "Hartsville") File No. BPH-870629NC

For Construction Permit
for a New FM Station on Channel 253A
in Hartsville, South Carolina

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Sunshine*. An informal objection has been filed by Sidney S. Tison, Jr., on behalf of B. Warren Curry, against Sunshine regarding the proximity of Sunshine's proposed tower structure to Mr. Curry's airport runway. Mr. Curry alleged in his complaint that Sunshine's proposed tower would interfere with the operations of his airport. As a result of the complaint, on November 29, 1989, Sunshine filed a petition for leave to amend its application. This late-filed amendment proposed a new transmitter site from that proposed in the original application, one which would not have the potential of interfering with Mr. Curry's airport operations.

3. Jurisdiction over matters involving air safety issues is deferred to the Federal Aviation Administration for analysis and judgment. The Commission recognizes the expertise of the FAA in determining whether a proposed structure constitutes an air navigation hazard. The Commission received notification on August 10, 1988 that the original site proposed by Sunshine had been cleared by the FAA as presenting no possibility of an air hazard. Consequently, we find no good cause for acceptance of the late filed November 29, 1989 amendment. In addition, an engineering review of the amendment reveals a conflict with an application (BPH-870626MU) filed for Lexington, SC. The Lexington application has already been accepted for filing and designated for hearing. For the above stated reasons, the amendment will therefore be returned. Furthermore, we have determined that the objection is without merit in this regard. Therefore, the informal objection filed by Mr. Curry will be denied.

4. *Hartsville*. The applicant proposes to mount his antenna on the existing WHCS(AM) tower. Our study indicates that the operation of the new proposal and the existing WHCS(AM) facility may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, the applicant is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The applicant must submit a detailed study based upon OST Bulletin No. 65, October, 1985, entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effect of the proposed operation and the WHCS(AM) operation. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. WCOS-FM, Columbia, SC filed a petition for Rule Making to move from Channel 250C to Channel 248C1. *See, Report and Order* in MM Docket 86-72, 2 FCC Rcd 2176 (1987). Subsequent to this Rule Making proceeding, WCOS filed a construction permit (BPH-890327IC) to implement the channel change. This construction permit was granted on June 1, 1989. To date, a license to cover the construction permit application has not been filed. The Hartsville applications being considered in this proceeding conflict with the WCOS-FM assignment on Channel 250C. However, no conflict exists with the proposed WCOS-FM facility on Channel 248. Accordingly, program tests for the successful Hartsville applicant will not commence until program tests for WCOS-FM on Channel 248C1 commence. Likewise, a license will not be granted for the successful Hartsville applicant until a license is granted for WCOS-FM on Channel 248C1. This condition will be reflected on the construction permit issued in this proceeding.

6. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting form the amendment will be disallowed.

APPLICANT	AMENDMENTS FILED
Sunshine	January 15, 1988
Hartsville	April 21, 1989 (engineering)

7. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of

its principals. Sunshine and Hartsville have not completed Item 4 correctly. The Sunshine application gives a post office box number as the residence address for Michael G. Orr and Theodore J. Gray, Jr. The Hartsville application gives a post office box number as the residence address for James Coker IV. Accordingly, Sunshine and Hartsville must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Hartsville in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the informal objection filed by Mr. B. Warren Curry against Sunshine is HEREBY DENIED.

12. IT IS FURTHER ORDERED, That the petition for leave to amend filed on November 29, 1989 by Sunshine IS HEREBY DENIED, and the corresponding amendment IS HEREBY RETURNED.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Hartsville shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the ultimate construction permit issued in the Hartsville proceeding will be conditioned as specified in paragraph 5.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Sunshine and Hartsville ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That Sunshine and Hartsville shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-39

In re Applications of

CHICAGO BROADCASTING INCORPORATED (hereafter "Chicago")	File No. BPH-880113MH
TERRI L. BONNER (hereafter "Bonner")	File No. BPH-880114MG
DYNAMIC COMMUNICATIONS, INC. (hereafter "Dynamic")	File No. BPH-880114MH
(Nameloc, Inc. d/b/a) NAMELOC BROADCASTING (hereafter "Nameloc")	File No. BPH-880114MI
LITTLE ROCK BROADCASTING, LTD. (hereafter "Broadcasting")	File No. BPH-880114MJ
CAPITAL MEDIA NETWORK LIMITED (hereafter "Capital")	File No. BPH-880114NJ
(Gayland R. Gaut and Robert L. Sisson d/b/a) LITTLE ROCK BROADCASTING PARTNERSHIP (hereafter "Partnership")	File No. BPH-880114NM
GFB COMMUNICATIONS, INC. (hereafter "GFB")	File No. BPH-880114NN

For Construction Permit
for a New FM Station on Channel 258A
(99.5 MHz) in Little Rock, Arkansas

HEARING DESIGNATION ORDER

Adopted: January 25, 1990; Released: February 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications or a new FM station.[1]

2. *Chicago*. In Section II, Item 1 of its application, Chicago identified its organizational structure as a corporation. However, in Section II, Item 4, it listed ownership interests totaling only 63.89% (Allen Wheeler-22.42%, Robert L. Weaver-16.86%, Quintette McDuffie-14.61% and Ronald C. Robinson-10%). Accordingly, Chicago will be required to amend this, and any other item as appropriate, to account for the remaining 36.11% interest.

3. A review of our Commission records reveals that an application (BAL-890206EB) was granted on February 22, 1989 for the *involuntary* assignment of Chicago's Jacksonville, Arkansas AM Station KOKY from Chicago to Richard L. Ramsay, Trustee. Exhibit 1 of the noted application notes that the United States Bankruptcy Court of the Eastern District of Arkansas declared Chicago bankrupt, and appointed Mr. Ramsay as trustee. Since Chicago failed to report this change in the information it provided in Section II, Item 5 of FCC Form 301, an appropriate reporting issue will be specified to determine if Chicago failed to comply with 47 C.F.R. § 1.65 with respect to the broadcast interests of the applicant. A financial issue will also, given the events noted above, be specified.

4. *Bonner*. Terri L. Bonner, the applicant, has reported that her husband, Tom Bonner, is Executive Vice President of Morris Network, Inc., licensee of Television Channel 4 Station KARK in Little Rock. Although Bonner's application indicated that Mr. Bonner would have divested his 1% interest in the previous licensee for KARK-TV, it fails to insure compliance with the Commission's cross-interest policy because there is no promise to sever his connection with the television station. *See Reexamination of the Commission's Cross - Interest Policy*, 2 FCC Rcd 3699 (1981); *revised* 4 FCC Rcd 2208 (1989). Since there is no indication that Mr. Bonner is not materially involved in the management and operation of KARK-TV, this represents a potential violation of the Commission's cross-interest policy prohibiting "meaningful" relationships between two competing media outlets serving substantially the same area. An appropriate issue will therefore be specified.

5. *Dynamic*. Dynamic proposes to locate its antenna on the existing tower of Little Rock, Arkansas AM Station KWNN (formerly KSOH). The instant application attempts to correct the coordinates from KWNN's licensed 34 degrees-45 minutes-57 seconds North Latitude/ 92 degrees-17 minutes-thirty eight seconds West Longitude to 34 degrees-45 minutes-58 seconds North Latitude/92 degrees-17 minutes-38 seconds West Longitude. However, our records do not show that KWNN corrected its coordinates and, consequently, a discrepancy exists between the proposed FM site and KWNN's licensed site. Furthermore, our records also indicate a slight discrepancy between the antenna heights above ground level (127 to 125.9 meters) and above mean sea level (203 to 204.3 meters) between those listed in Dynamic's application and those in our Antenna Survey Branch files for the specified tower. While neither discrepancy affects the accept-

ability of Dynamic's application, it will be required to correct the coordinates of co-owned KWNN with the Mass Media Bureau's AM Branch within 30 days of the release of this Order and submit an amendment addressing the antenna height discrepancy to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Nameloc.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Nameloc has not completed Item 4 correctly, providing no address for principal Loretta Lever. Accordingly, Nameloc must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. *Capital.* T. J. Williams, vice-president and 33 1/3% owner of Capital, is employed in an unspecified capacity at television station KARK (Little Rock) and at FM Station KWTD (Lonoke, Arkansas). Ms. Williams has indicated that she "plans to resign these positions if Capital's application is granted." Since Capital fails to indicate whether Ms. Williams is employed in a position that might result in a violation of the Commission's multiple ownership rules or cross interest policy, Capital will be required to submit an amendment to the presiding Administrative Law Judge clarifying the nature of Ms. Williams' employment. If appropriate, the presiding Administrative Law Judge may then specify that any grant of Capital's application be conditioned upon Ms. Williams severance of these connections prior to the commencement of program test authority.

8. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Capital filed such statement, it fails to list a women's organization the applicant would utilize to recruit qualified female applicants. Accordingly, Capital will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

9. *Other matters.* Chicago and Partnership each propose to locate their respective antennas atop a building in Little Rock, Arkansas. This site is shared by Little Rock television translator station K49CG (BPTTL-810116W3, granted July 29, 1988). Analysis of the radiofrequency levels at the rooftop level indicate that a radiofrequency radiation hazard may exist when considering the television translator facility alone. Chicago's application is silent on the matter of how its proposal would add to this problem; Partnership's application acknowledges the translator's existence, indicates that warning signs will be posted, access to the tower will be limited, and antennas will be designed to bring the radiofrequency levels into compliance. However, due to the potentially high radiofrequency levels calculated, we are unable to verify that these procedures will eliminate the problem. Further, we are unable to conclude that people within the building will not be exposed to high radiofrequency levels. Consequently, we are concerned that Chicago and Partnership may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Chicago and Partnership's proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311 within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

10. Bonner (on May 9, 1988) and Dynamic (on March 28 and August 30, 1988) petitioned for leave to amend their respective applications. The accompanying amendments were filed after March 25, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine the facts and circumstances surrounding Chicago's failure to timely update its application and whether Chicago violated 47 C.F.R. § 1.65;

(b) To determine, in light of the facts adduced pursuant to issue (a) above, whether Chicago misrepresented facts to or concealed information from, or attempted to mislead the Commission;

(c) To determine, in light of the facts adduced pursuant to issues (a) and (b) above, whether Chicago possesses the basic qualifications to be a licensee of the facilities sought herein.

2. To determine with respect to Chicago, whether the applicant is financially qualified.

3. To determine with respect to Bonner, whether the involvement of her husband, Tom Bonner, with television station KARK-TV in Little Rock, Arkansas is consistent with the Commission's cross-interest policy and, if not, whether a grant of the application would be in the public interest.

4. If a final environmental impact statement is issued with respect to Chicago and/or Partnership in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That Chicago submit an amendment detailing its complete ownership to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That Dynamic file an application with the Mass Media Bureau's AM Branch to correct the transmitter site coordinates for co-owned AM Station KWNN, and submit an amendment correcting its antenna height above ground and mean sea level to the presiding Administrative Law Judge, both within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Nameloc shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

17. IT IS FURTHER ORDERED, That Capital submit an amendment clarifying the nature of Ms. T.J. Williams employment with Stations KARK-TV and KWTD (FM) to the presiding Administrative Law Judge within thirty days of the release of this Order.

18. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Capital shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 19 hereinabove, Chicago and Partnership shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Bonner and Dynamic ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Pursuant to its request filed August 24, 1989, the application (File No. BPH-880114NQ) filed by SpaceCom, Inc. was dismissed December 13, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2

Transmittal No. 401

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1990; Released: February 2, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By the captioned transmittal, the Ameritech Operating Companies (Ameritech) establishes general tariff rates for the Local Distribution Channel (LDC) portion of Custom High Capacity Service, also known as DS3 service. Ameritech Tr. No. 401 Description and Justification (D&J) at 1.[1] Under this rate structure, DS3 LDCs are available in packages of 1, 2, 3, 6, or 12 LDCs. All LDCs in a package must be provided and billed to the same customer, at the same customer premises, and must be served by the same serving wire center (SWC). Customers may choose Optional Payment Plans (OPPs) of 12, 36, or 60 months with reduced rates for longer commitments. A Monthly Extension Rate (MER) is available after a customer has completed its initial OPP. *Id.* at 2-3.

II. PLEADINGS

2. Three parties filed petitions against Ameritech's transmittal. Metropolitan Fiber Systems (MFS) urges us to suspend and investigate Ameritech Transmittal No. 401. First, MFS argues that the LDC rates should be investigated because Ameritech has not demonstrated that the volume discount and long-term payment plans are cost justified. MFS Petition at 3. Rather, MFS notes, Ameritech states that its rates were developed simply as multiples of its existing DS1 charges. MFS states that it is impossible to determine whether the DS3 to DS1 crossover ratios for different service terms were selected as a result of cost analysis, at random, or, as MFS contends is more likely, by working backwards from the DS3 prices that Ameritech wanted to offer for marketing purposes. *Id.* at 4.

3. MFS argues that the term and volume discounts vary widely among the five states in which Ameritech provides service as well as by the number of LDCs ordered. In addition, MFS states, Ameritech's crossover pricing is reminiscent of the LECs' strategic pricing of DS1 service. In the *Strategic Pricing Order*, however, the Commission found that there is a cost basis for the crossover ratio established, MFS notes. MFS concludes that Ameritech's filing raises the same strategic pricing and cost support issues that recently led the Bureau to suspend and investigate the general DS3 tariffs of Cincinnati Bell and Southern New England Telephone Company. MFS requests that this filing be included in that investigation or that a new investigation be initiated. *Id.* at 4-6.

4. Indiana Digital Access (IDA) requests suspension of Ameritech's DS3 LDC rates. IDA asserts that these rates appear to be inconsistent with the Commission's recent determination that strategic pricing is no longer justified. According to IDA, the crossover ratio between Ameritech's DS3 rates and Ameritech's DS1 rates varies solely on the basis of service term chosen. According to IDA, such strategic pricing is unreasonably discriminatory. IDA Petition at 1-2. In addition, IDA argues, the tariff's provisions for installation costs and termination liabilities are vague and may lead to further discrimination. Finally, IDA contends, the rates in this transmittal are inconsistent with the ICB rate levels on which Ameritech claims to have based its rates. *Id.* at 3-4.

5. Communications Transmission, Inc. (CTI) seeks rejection of this transmittal. First, CTI argues that the filing should be rejected because the Commission's recent order in the ICB investigation directed Ameritech to make a DS3 tariff filing that will be effective March 4, 1990. CTI Petition at 2 citing Local Exchange Carriers Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, released Dec. 18, 1989 (*ICB Order*). Next, CTI argues that the tariff should be rejected because it does not comply with the requirements established in the *ICB Order* in that it does not convert grandfathered ICBs to generally effective rates and does not implement the credit mechanisms established in that Order. *Id.* at 3. Finally, CTI contends that the rates appear to be unreasonably discriminatory because the rates vary solely on the basis of the length of the service term selected by the customer. *Id.* at 3-4.[2]

6. In its opposition to the petitions, Ameritech argues that its term and volume discount rate structure is lawful. Ameritech notes that its tariff is consistent with Ameritech's DS1 rate structure as well as DS3 rate structures of other carriers "that the Commission has previously permitted to take effect." Ameritech Opposition at 2. Moreover, although Ameritech bases its DS3 LDC rates on multiples of its DS1 rate, Ameritech argues that its DS3 rates are not strategically set. Ameritech notes that DS3 service is outside the ambit of the Commission's Strategic Pricing Orders. *Id.* at 3-4. [3] Ameritech argues that its volume discounted rate structure generally reflects costs and that the crossover ratios it has used are within the range of crossovers used by other RBOCs in rates that have become effective. *Id.* at 4-6.

7. Ameritech also argues that its term-related rates are reasonable and are consistent with its existing DS1 rate structure. Moreover, Ameritech notes, other carriers have similar term-of-service discounts for DS3 rates. *Id.* at 7-8. Ameritech also contends that the existence of competitive alternatives demonstrates the lack of barriers to entry in the DS3 service market. Ameritech concludes that its term discounts will not lock in customers or discourage competitive entry. *Id.* at 8-9. Finally, Ameritech argues that its Monthly Extension Rate is non-discriminatory and recovers relevant costs from the customer. *Id.* at 9-10.

III. DISCUSSION

8. In its recent Order affirming the *Strategic Pricing Order*,[4] the Commission concluded that strategic pricing of special access service is no longer justified. The Commission therefore required that carriers implement more fully cost-based pricing of special access service. As a surrogate for detailed cost allocations, the Commission reaffirmed its adoption of a range of reasonableness around a cost crossover ratio as a likely approximation of cost-based rates.[5] The particular crossover range affirmed in that Order, however, is derived from the relationship between the cost of DS1 service and Voice Grade special access service. The cost support materials that Ameritech submitted do not demonstrate that a crossover ratio between DS1 and DS3 services will approximate costs. Therefore, we conclude that these DS3 rates warrant investigation. In order to facilitate this process, we will suspend, for one day, the effectiveness of the proposed DS3 LDC rates, and make these rates subject to the investigation initiated in CC Docket No. 89-533.[6] We will designate issues for investigation at a later date. We also allow Ameritech to advance the effective date of these revisions.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 401, revisions relating to the DS3 Local Distribution Channel rates are subject to the investigation instituted in CC Docket No. 89-533.

10. IT IS FURTHER ORDERED that the Ameritech Operating Companies MAY FILE tariff revisions, to be effective on not less than one day's notice, in order to advance the effective date of the proposed DS3 Local Distribution Channel rates.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Ameritech Operating Companies SHALL KEEP accurate account of all amounts received pursuant to implementation of the proposed DS3 Local Distribution Channel rates which are the subject of the investigation.

12. IT IS FURTHER ORDERED that, pursuant to authority delegated to the Chief, Common Carrier Bureau in Section 61.58(a)(2) of the Commission's Rules, 47 C.F.R. § 61.58(a)(2), the Ameritech Operating Companies SHALL DEFER the effective date of the proposed revisions in Transmittal No. 401 that would introduce Fiber Hub Service and cross-connections at designated Fiber Hubs as access service from February 5, 1990, to February 20, 1990.

13. IT IS FURTHER ORDERED that for the purpose of implementing the tariff filings referenced herein, we assign Special Permission No. 90-109 and waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59.

14. IT IS FURTHER ORDERED that the petitions to suspend and investigate filed by Metropolitan Fiber Systems, Inc. and Indiana Digital Access ARE GRANTED to the extent provided herein.

15. IT IS FURTHER ORDERED that the petition to reject filed by Communications Transmission, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech originally proposed to introduce Fiber Hub Service and cross-connections at designated Fiber Hubs as special access service. Fiber Hub Service and cross-connections have been available in the past as specialized arrangements in Section 12 of Ameritech's access tariff. *Id.* at 4. By this Order we defer this portion of the filing to February 20, 1990.

[2] CTI also concludes that Ameritech "has failed to show its cost justification as required by 47 C.F.R. § 61.49 for the different rate treatment." *Id.* at 4.

[3] Ameritech also notes that the captioned filing was not intended to respond to the requirements imposed by the *ICB Order*. On January 18, 1990, Ameritech filed Transmittal No. 410 which purports to comply with that Order.

[4] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, FCC 89-330, released Jan. 19, 1990 (*Reconsideration Order*).

[6] *See* Cincinnati Bell Telephone Co., CC Docket No. 89-533, DA 89-1483, released Nov. 15, 1989 (Com.Car.Bur.) (*Investigation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-275

In re Applications of

JULIA S. ZOZAYA	File No. BPH-860703MI
FLAGSTAFF BROADCASTING FOUNDATION	File No. BPH-860707NQ
FLAGSTAFF BROADCASTING PARTNERSHIP	File No. BPH-860707OC

For Construction Permit for a
New FM Station on Channel 261C2,
Flagstaff, Arizona

Appearances

Katrina Renouf on behalf of Julia S. Zozaya; *Dewitt C. Conklin* on behalf of Flagstaff Broadcasting Foundation; *Edward P. Taptich, James K. Edmundson,* and *Lauren K. Voltmer* on behalf of Flagstaff Broadcasting Partnership.

DECISION

Adopted: January 24, 1990; Released: February 15, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board are (1) the *Initial Decision*, 4 FCC Rcd 6271 (1989)(I.D.) of Administrative Law Judge John M. Frysiak (ALJ); (2) the exceptions filed by Julia S. Zozaya (Zozaya), Flagstaff Broadcasting Foundation (Foundation), and Flagstaff Broadcasting Partnership (FBP); and (3) the replies to exceptions filed by Zozaya and FBP. No party to this proceeding requested oral argument. Based upon our review of the foregoing documents and the record below, we affirm the ALJ and grant the application of FBP.

2. The *Hearing Designation Order*, 3 FCC Rcd 3190 (1988)(HDO), originally designated six competing applicants for consolidated hearing. However, only the three captioned applicants remain. The proceeding was heard before the ALJ solely on the "standard comparative" issues, as guided by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965)(*Policy Statement*). The ALJ determined FBP to be the best qualified applicant to receive the construction permit at issue (I.D., para. 65), based upon the award of a 100% full-time integration of ownership into management credit to FBP, while awarding no corresponding credit on that factor of "substantial importance," *id.*, at 395, to either Zozaya or Foundation.

FLAGSTAFF BROADCASTING PARTNERSHIP

3. *Integration:* The ALJ found that FBP is a Missouri general partnership, in which Boyd W. Fellows and Bradley S. Walpole each hold a 50% equity and voting interest (FBP Exh. 1). Both partners claim that they will work full-time at FBP's proposed station (FBP Exh. 3 at 1; FBP Exh. 4 at 1). Fellows is proposed as general manager, while Walpole will serve as station manager and will have primary responsibility for the technical operations of the station, sharing with Fellows responsiblity for programming, public service/community affairs, news, hiring, sales and financial planning (FBP Exh. 3; FBP Exh. 4). Fellows now resides in Sturgeon Bay, Wisconsin, but will move to Flagstaff if FBP's application is granted. Tr. 288, 309. He is currently the general manager (and 60% owner) of WDCW(FM), Sturgeon Bay, Wisconsin. He has 33 years of broadcast-related experience (FBP Exh. 3), and is not contractually obligated to remain at his position in Sturgeon Bay (FBP Exh. 3 at 2; Tr. 309-310, 316, 320, 330-331). Walpole currently resides in St. Louis, Missouri, but also promises to move to Flagstaff if FBP's application is granted (FBP Exh. 4; Tr. 343, 348). He has broadcast experience, including the following: From 1975 through 1979, while a high school student, Walpole was an engineer (and from 1977-1978 chief engineer), as well as an announcer at KLSR(FM), a radio station operated by the Lindberg, Missouri, School District, earning a First Class Radio Telephone Operator's License at age sixteen. From 1979 through 1983, Walpole worked as a staff engineer at KSDK(TV), St. Louis, Missouri, and in 1983 he was promoted to technical director of the station (a position he held until 1985). Subsequently, Walpole was employed by KMOX-TV (now KMOV-TV), St. Louis, Missouri, as a staff engineer, whereafter he was promoted to technical director in 1986 (a position he currently holds)(FBP Exh. 4; Tr. 344, 349-350).

4. In light of the foregoing, the ALJ concluded that FBP would receive 100% ownership/management integration credit for Fellows' and Walpole's proposed full-time participation in the operation of the Flagstaff facility. The ALJ determined that: "There is no evidence that their commitments will not be carried out" (I.D., para. 62). In addition to 100% quantitative integration credit, the ALJ determined that FBP's proposal was elevated by both partners' commitment to reside in Flagstaff if FBP's application is granted; by the partners' extensive broadcast experience; and by FBP's auxiliary power proposal. *Id.*

5. *Diversification:* While the FBP partnership has no interest in any medium of mass communication, Fellows is President, Treasurer, a Director, and 60% voting shareholder of Fellows Broadcast Service, Inc., licensee of the aforementioned WDCW(FM), Sturgeon Bay, Wisconsin. In a July 11, 1988, amendment to FBP's instant application, Fellows pledged that, in the event of a grant of FBP's application, he would divest himself of all his interest (*i.e.*, general managership, officership, directorship, and shares of stock) in WDCW(FM). (FBP Exh. 2; FBP Exh. 3, Zozaya Exh. 5 at 5; Tr. 290-291, 309-311, 329, 330, 337, 340-341). However, this divestiture pledge was made after the "B cut-off" date established in this proceeding (Foundation Exceptions at 3). Thus, the

ALJ determined that Fellows' 60% interest in WDCW(FM) would be considered in the comparative attributes of FBP. As a result, FBP was assessed a "very slight to slight" diversification demerit, based upon consideration of Fellows' interest in a facility some 1,400 miles from Flagstaff. I.D., para. 63. FBP does not contest this diversification demerit.

6. *Discussion:* Zozaya argues that the ALJ "underrated" the diversification demerit against FBP, but does not indicate what she believes the extent of that demerit should be. Zozaya also claims the ALJ "ignored" the diversification demerit "effect" on FBP's proposed integration. While admitting "none of these matters would necessarily be of any significance standing alone," Zozaya urges that their combined effect "cannot be ignored" (Zozaya Exceptions at 16-17). Moreover, Zozaya asserts that inasmuch as Fellows' did not promise to timely divest his 60% interest in WDCW(FM), his pledge to "disengage himself from all current obligations to the extent necessary" (*id.*, at 15, quoting FBP Exh. 3), is too vague to support his Flagstaff integration proposal. FBP replies that Fellows' promise to resign his WDCW(FM) position and move to Flagstaff is unequivocal, and is supported in his proposed integration statement (FBP Exh. 3), and by his testimony (Tr. 327-329, 331). [1] The Board has reviewed the pertinent evidence on the record, and, like the ALJ, we find no infirmities in Fellows' claim to 100% integration credit here.

7. For its part, Foundation's only exception to FBP's integration credit is that FBP did not disclose its proposed integration of ownership into management in its application (FCC Form 301). While the Commission has recently modified FCC Form 301 and declared that an applicant " *may* disclose its integration proposal when it originally files its FCC Form 301 . . . it *must* file its integration proposal . . . by the amendment-as-of-right date," [2] it is clear that the FCC Form 301 utilized by FBP "has never been read to explicitly require applicants to set forth their full ownership participation proposals [therein], *see Muncie Broadcasting Corp.*, 89 FCC 2d 123 (Rev.Bd. 1982)." *Northland Communications*, 100 FCC 2d 914, 916 (Rev. Bd. 1985). Indeed, this conclusion is buttressed by the Commission's own language in its *1989 Revision of FCC Form 301* order, *supra* (*i. e.*, an applicant must now disclose its integration plans by the amendment-as-of-right date, but " *may* " disclose its plans on FCC Form 301 at the time of filing). Thus, Foundation's exceptions in this regard will be denied.

8. With respect to the diversification criterion, the ALJ concluded that FBP should receive a "very slight to slight diversification demerit for Fellows' interest in WDCW(FM)." Under the circumstances here present, we hold that FBP should not be assessed more than a "slight" demerit for Fellows' 60% interest in a broadcast facility situated some 1400 miles distant from Flagstaff, Arizona. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1613 (Rev. Bd. 1985), *recon. denied*, 102 FCC 2d 465 (Rev. Bd. 1985)("slight" demerit for AM facility in Miami, Florida in Las Vegas, Nevada proceeding); *Joseph Bahr*, 92 FCC 2d 114 (Rev. Bd. 1982), *modified on other grounds sub nom. Global Broadcasting Group, Inc.*, 94 FCC 2d 809 (1983); *see also Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578 (Rev. Bd. 1984); *rev. denied*, 103 FCC 2d 375 (1986)(no more than slight demerit assessed for two stations each 1500 miles distant); *Payne Commmunications, Inc.*, 1 FCC Rcd 1052, 1061 (Rev. Bd. 1986).

JULIA S. ZOZAYA

9. *Integration:* The ALJ found that Zozaya, an individual applicant, is 63 years old, legally blind, and Hispanic (Zozaya Exh. 1; Tr. 36, 54, 132). She proposes full-time integration (at least 40 hours per week) as the station's general manager. To effect her integration proposal, Zozaya proposes to relocate to Flagstaff, Arizona (Zozaya Exh. 1, Tr. 170, 173).

10. In her "Integration and Diversification Statement" filed July 11, 1988 (FBP Exh. 6), Zozaya advised that she was also a pending applicant (and proposed general manager) for a new facility to operate on FM Channel 290A, at Paradise Valley, Arizona. In the Paradise Valley proceeding, Zozaya also proposed integration as general manager with day-to-day management on a full-time basis (at least 40 hours per week) (FBP Exh. 7; Tr. 106). However, her conflicting Paradise Valley integration statement was not made available in the instant proceeding, as required pursuant to prevailing discovery procedures. *See* "Motion For Order Requiring Joint Document Production," *approved, Memorandum and Opinion and Order*, FCC 88M-2698, released August 22, 1988.

11. Nevertheless, in attempting to explain this patent conflict of integration proposals, Zozaya allegedly believed that a settlement agreement had been reached in the instant proceeding. However, in the Paradise Valley proceeding, Zozaya revised her there-pending integration proposal on January 3, 1989 (nearly a full month *subsequent* to the time that "integration" statements were to be filed) (I.D. at n. 5), and reported that settlement negotiations here had failed approximately one week earlier. As a result, she claimed that she was withdrawing her proposal to move to Paradise Valley, and would reduce her Paradise Valley time commitment to a minimum of 30 hours per week (FBP Exh. 8; Tr. 110). However, in her direct case here, Zozaya did not allude to the integration commitment she had made in the Paradise Valley proceeding, and she supplied no information as to how she proposed to effectuate her two separate integration proposals.

12. As a result of the foregoing, the ALJ determined that Zozaya would not be entitled to receive any integration credit for her Flagstaff proposal, because, *inter alia*, Zozaya could not demonstrate how she could effectuate her simultaneous proposals. He found that her two proposals to (1) work at least 30 hours per week at the Paradise Valley facility, and (2) work at least 40 hours per week at the Flagstaff station, not credible. Additionally, the ALJ found (and Zozaya has not excepted to this finding), that Zozaya's on-going civic activities "currently occupy about 25 hours a week (Tr. 152, 176-77)." Further, "[i]n the event of a grant, Ms. Zozaya would continue her civic activities." I.D. at para. 15.

13. Zozaya argues that her plans for "effectuation of her proposal" to devote 70-plus hours per week to both broadcast facilities "were carefully thought out and delineated for the record." More specifically, Zozaya claims as follows (Exceptions at 7-8; emphases added):

> Mrs. Zozaya is confident of her ability to meet both pledges, should the opportunity arise, because she had planned her work day around a system followed in the management of her former Phoenix FM station, KNNN. At KNNN she regularly worked from 6:00 a.m. to 10:00 p.m., including weekends. Tr. 163-64. Were she to manage both these stations, she would spend the hours from 6:00 to 10:00 a.m. at the Flagstaff station, working largely on the telephone, handling national sales, FCC and other Eastern Time Zone matters, as she did with KNNN, *with the time divided equally between Paradise Valley and Flagstaff*. Tr. 173-74. From 10:00 to 5:00 or so she would devote herself exclusively to Flagstaff, with the terminus "depending on the day and the time requirements, because often the requirements are much greater than that." Tr. 173. *From 5: 00 p. m. to 8: 00 or so, she would work with her Paradise Valley staff by telephone. Id. One day a week she would spend at the Paradise Valley station:* "It might be a weekend day; it might be the middle of the week, depending on what was best, with a priority for Flagstaff." Tr. 173-74.

14. *Discussion:* We affirm the ALJ's refusal to credit Zozaya's full-time integration proposal here. Whatever Zozaya's good intentions, the law is clear that a full-time integration proposal must not be conflicted by other simultaneous commitments, and that an applicant must always establish the reliability of its integration proposal by indicating how its other business interests will be eliminated or curtailed to effectuate the commitment to the station. *See Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). In weighing integration proposals, consideration has always been given to the ability of applicant principals to effectuate their broadcast proposals in light of their other business and professional activities. *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev.Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987), *aff'd by judgment*, No. 87-1256 (D.C. Cir. 1988); *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982), *recon. denied*, 92 FCC 2d 914 (Rev. Bd. 1982), *aff'd* , FCC 83-415, released September 2, 1983, *aff'd mem. sub nom. Blake - Potash Corp. v.* FCC, No. 83-2112 (D.C. Cir. 1985). *See also Knoxville Broadcasting Corp.*, 103 FCC 2d 669 (Rev. Bd. 1986); *Washoe Shoshone Broadcasting* 3 FCC Rcd 3948, 3952 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988). Here, Zozaya's showing is inadequate and her proposal inherently unreliable. In fact, Zozaya's situation is most analogous to *Berryville Broadcasting Co.*, 70 FCC 2d 1, 10-12 (Rev. Bd. 1978). There, the Board rejected a full-time integration proposal because an applicant principal had other broadcast interests to which he had committed substantial time, "thus pushing his total work week up to approximately 70 hours." The Board there also rejected even the meager 16-hour work week integration proposal of another applicant whose principal's work-commitment already totaled "61 to 71 hours a week, in addition to drive time . . . ." Id., at 13. *A fortiori,* Zozaya's claim that she could simultaneously manage two stations some 135 miles apart cannot be credited here, from a factual or a legal standpoint. [3]

15. In sum, because of the overambitious claim that Zozaya intends to devote at least 70 hours per week to both proposed broadcast facilities (not including travel time,) plus an additional 25 hours per week to already established civic activities, we hold that Zozaya's integration pledge here is inherently unachievable. *See Berryville Broadcasting.* As with respect to the principals in that proceeding, Zozaya will receive no integration credit here for her full-time proposal for the Flagstaff facility.

FLAGSTAFF BROADCASTING FOUNDATION

16. This applicant candidly concedes that there will be no integration of its ownership into the day-to-day management of the proposed facility (Foundation Exceptions at para. 14). In light of Foundation's concession that it proposes no such integration, and our prior discussion of extant precedent in this regard with respect to FBP and Zozaya, we hold that the ALJ did not err in refusing to award any integration credit to Foundation.

CONCLUSIONS

17. We find no error in the ALJ's award of the construction permit at contest here to FBP. It is the clearly preferred applicant. With respect to the critical integration of ownership into management comparative criterion, FBP is the only applicant to receive such credit. With FBP receiving full 100% "integration" credit, offset only by a "slight" demerit under the diversification criterion, it easily prevails over Zozaya and Foundation, both of which receive no integration credit whatsoever. *Family Broadcasting Group*, 93 FCC 2d 771, 778 (Rev. Bd. 1983). Moreover, even if Zozaya were awarded part-time credit for her proposal, this would fall far short of the 100% full-time credit awarded FBP.

18. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed by Flagstaff Broadcasting Partnership on August 30, 1989 IS GRANTED, and the amendment IS ACCEPTED; and,

19. IT IS FURTHER ORDERED, That the applications of Julia S. Zozaya (File No BPH-860703MI) and Flagstaff Broadcasting Foundation (File No. BPH-860707NQ) ARE DENIED; and the application of Flagstaff Broadcasting Partnership (File No. BPH-860707OC) for a new FM broadcast facility to operate on Channel 261C2 at Flagstaff, Arizona, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] In FBP Exh. 2 ("Other Mass Media Interests"), Fellows claimed:

> Mr. Fellows has pledged to divest himself of all his interest . . . in Fellows Broadcast Service, Inc., as well as his position at WDCW(FM), in the event that FBP's application is granted . . . .

In FBP Exh. 3 ("Proposed Integration of Boyd W. Fellows"), Fellows disclosed that he:

> will work full-time (at least 40 hours per week) at the applicant's proposed station and will disengage himself from all current obligations to the extent necessary to fulfill this commitment.

As discussed in paragraph 5 of the text, it is not disputed that Fellows' divestiture pledge with respect to his Sturgeon Bay station came too late, as a procedural matter, to spare FBP a diversification demerit. However, it is clear from the quoted language of FBP's timely filed integration statement and his testimony that Fellows unequivocally proposed full-time integration into the new Flagstaff station. While FBP must suffer the untimeliness of its divestiture pledge under our diversification criterion, that factor does not undermine Fellows' timely integration pledge, since nothing would estop Fellows from personally integrating into this Flagstaff facility, even if he were retaining his 60% interest in WDCW(FM).

[2] *Report and Order, In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3860 (1989)("*1989 Revision of FCC Form 301*") (Emphases added).

[3] *Pentecostal Revival Ass'n, Inc.*, 1 FCC Rcd 842 (Rev. Bd. 1986), cited by Zozaya and the ALJ, is not to the contrary, and the Board did not there diverge from its consistent line of precedent exemplified clearly in *Berryville Broadcasting* and its progeny. Nothing in *Berryville* or *Pentecostal* can or should be read to suggest that the Board will accept a full-time integration pledge where a substantial conflict with other activities is apparent. Indeed, and dictum aside, both cases rejected squarely the full-time integration proposals at issue because of conflicts no less than Zozaya's two conflicting integration proposals, and Zozaya cites no case where a full-time integration pledge has been accepted in the face of a patent conflict such as hers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (WHBQ-TV) Memphis, Tennessee	**MM DOCKET NO. 84-1212** File No. BPCT-790402LC
For Renewal of License	
SOUTH JERSEY RADIO, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1213** File No. BPCT-830511KE
NEW SOUTH MEDIA COMPANY Memphis, Tennessee	**MM DOCKET NO. 84-1214** File No. BPCT-830512KE
GREATER MEMPHIS COMMUNICATIONS, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1218** File No. BPCT-830512KI
RIVER CITY COMMUNICATIONS CORPORATION Memphis, Tennessee	**MM DOCKET NO. 84-1219** File No. BPCT-830512KJ
SHELBY BROADCASTING LIMITED PARTNERSHIP Memphis, Tennessee	**MM DOCKET NO. 84-1220** File No. BPCT-830512KL
MEMPHIS TELECASTERS, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1221** File No. BPCT- 830512KM
COZZIN COMMUNICATIONS OF MEMPHIS, INC. Memphis, Tennessee	**MM DOCKET NO. 84-1222** File No. BPCT-830512KN
RIVER CITY BROADCASTING, LTD. Memphis, Tennessee	**MM DOCKET NO. 84-1224** File No. BPCT-830512KP
For Construction Permit For a New Television Station	

ORDER

Adopted: February 5, 1990; Released: February 15, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On February 2, 1990, the Commission released a *Memorandum Opinion and Order*, FCC 90-17, which (1) approved a universal settlement agreement amongst the parties; (2) terminated the hearing proceeding; and (3) directed the Review Board "to dismiss as moot exceptions to the partial initial decision dealing with the comparative qualifications of the various applicants" in this case.

2. ACCORDINGLY, IT IS ORDERED, That the pending exceptions before the Review Board to the partial initial decision in this proceeding, *RKO General, Inc. (WHBQ - TV)*, 2 FCC Rcd 4111 (1987), ARE HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-352

In re Applications of	
Eunice Wilder and Sheridan Broadcasting Corp. d/b/a WEYBURN BROADCASTING LIMITED PARTNERSHIP	File No. BPH-851213MN
WKIE-FM, INC	File No. BPH-851216OA
GREATER RICHMOND RADIO, LTD.	File No. BPH-851216OH
BERTRAM BROADCASTING GROUP	File No. BPH-851216OM
BARBARA B. BENNS	File No. BPH-851216ON
JAMES RIVER COMMUNICATIONS CORPORATION	File No. BPH-851216OO
FUTURE BROADCAST LIMITED PARTNERSHIP	File No. BPH-851216OV
WITJO BROADCASTING, INC.	File No. BPH-851216OX
PENNY DRUCKER	File No. BPH-851216QB
VIRGINIA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-851216QE
For Construction Permit for a New FM Station on Channel 266A in Richmond, Virginia	

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1990; Released: February 15, 1990

By the Review Board: MARINO (Chairman) and ESBENSEN.

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 5310 (1989) (*I. D.*), of Administrative Law Judge Joseph Chachkin (ALJ), granting the application of James River Communications Corporation (James River) for authority to construct and operate a new FM station at Richmond, Virginia. Exceptions were filed by all the applicants shown in the caption except for Greater Richmond Radio, Ltd. and Bertram Broadcasting Group. Greater Richmond's and Bertram's applications, therefore, will be dismissed for failure to prosecute. *See* 47 CFR §1.276(f).

2. Four of the parties, Weyburn Broadcasting Limited Partnership, WKIE- FM, Inc., Barbara B. Benns, and Future Broadcast Limited Partnership, have excepted to the ALJ's denial of two enlargement petitions which sought financial issues against James River. *See Memorandum Opinion and Order*, FCC 88M-1121, released April 15, 1988 (ALJ); *Memorandum Opinion and Order*, FCC 89M-860, released March 17, 1989 (ALJ). Based upon our review of of the *I. D.* in light of the exceptions, the oral argument held December 8, 1989, and our own independent examination of the record, we find that substantial and material questions of fact are raised with respect to the financial proposal of James River that must be resolved before its application can otherwise be granted. Therefore, this proceeding will be remanded to the ALJ for the adduction of additional evidence and the preparation of a Supplemental Initial Decision.

BACKGROUND

3. Claudette Black McDaniel, the sole voting shareholder and 20% equity owner of James River, certified that that applicant was financially qualified when it filed its application on December 16, 1985. Her certification was based upon a letter issued by the Bank of Virginia dated December 11, 1985. That letter expressly indicated that a loan to the applicant would be subject to the personal guarantees of the James River principals, which, at that time, in addition to McDaniel, included Dr. Renard Charity and his wife, Dr. Cynthia Charity. The Charitys were non-voting stockholders, and held, in the aggregate, 80% of the equity of the applicant. They were also responsible for 80% of the corporate expenses, while McDaniel was and is obligated for the remaining 20%. The bank letter also explicitly indicated that the loan would be available "assuming no adverse changes."

4. On September 24, 1987, approximately two weeks after the applications had been set for hearing, a building then under construction and owned by the Charitys collapsed, killing one construction worker and seriously injuring another. The impact of the accident on the financial qualifications of James River was apparent to McDaniel, as she testified at deposition in January 1988 (Tr. 132-133):

> [M]y non-voting stockholders had a tremendous financial problem at that particular time when that building collapsed in Richmond, the medical center collapsed and a person died. So, they had to pool their resources and do other things.
>
> * * *
>
> I knew they had that problem with the building. That's a tremendous thing because they were going to be sued and all that stuff, and I wanted to find out the best way that I could handle that, and during that time, I was also trying to look around in the community for another possible person or persons that could possibly be non-voting stock people.

5. Indeed, subsequent to the building collapse, James River did not pay its current expenses incurred in prosecuting its application, which resulted in the withdrawal of its initial FCC counsel from this proceeding for nonpayment of fees (on November 18, 1987). Moreover, the Bank of Virginia was not notified of the accident, and no amendment indicating any change in the financial proposal of James River was filed with the Commission. The ALJ recounted the subsequent events (based on evidence adduced under the standard comparative issue, there being no financial issue against James River in the proceeding) (*I. D.*, at paras. 120-121):

> Toward the end of 1987, McDaniel began looking for a new non-voting stockholder for James River (Tr. 1333). She did so because she believed the Drs. Charity were not enthusiastic about continuing as investors in the venture(Tr. 1333). A large legal bill was owed to FCC counsel that was left unpaid (Tr. 1336). McDaniel asked her local counsel to ask the Drs. Charity to pay that bill (Tr. 1337). The Charitys indicated that they would pay the bill (Tr. 1337). They paid some but not all of it (Tr. 1337). James River's FCC counsel withdrew from the case (Tr. 1336).
>
> McDaniel was subsequently contacted by attorney Van Horn, counsel to then applicant Robert Fish. Attorney Van Horn indicated that McDaniel's FCC counsel had withdrawn and asked if there was a problem (Tr. 1337). McDaniel indicated that a bill had been left unpaid and that she was looking for investors to pick up the balance, because she was tired of waiting for the Drs. Charity to make their contribution (Tr. 1338).

Moreover, in addition to counsel's fee, James River did not pay outstanding engineering fees and for the publication of local notice of hearing. *See* Future Broadcast Limited Partnership's Petition to Enlarge Issues, filed February 17, 1988, at Exh. 8 (Van Horn letter itemizing corporate indebtedness).

6. James River was apparently only financially revived on January 15, 1988 (*i.e.*, nearly 4 months after the building collapse), when Robert Fish purchased all of the Charitys' shares of non-voting stock. Subsequent to Fish's stock purchase, McDaniel obtained a letter from the Fleet National Bank on February 14, 1988 indicating that that institution would make available up to $500,000, apparently premised upon Fish's new position as the 80% non-voting shareholder.

7. The exceptors contend that James River lost its "reasonable assurance" of financing when the Charitys' building collapsed in light of the Bank of Virginia's personal guarantee requirement from the Charitys and the "significant change" in the Charitys' financial posture. Moreover, the exceptors point to two lawsuits filed against McDaniel by Commercial Credit Corporation (in July 1987 for approximately $9000), and by the Dominion Bank of Richmond, N.A. (in October 1988 for approximately $10,000), which, they argue, raise further financial questions concerning whether McDaniel can or will meet her *pro rata* share of the applicant's expenses. Finally, in another context, applicant Benns attaches to her petition to reopen the record and enlarge the issues on character matters (filed October 5, 1989) four criminal warrants alleging that McDaniel solicited loans, including a loan from the Charitys, in return for favorable votes from her as a member of the Richmond City Council.

DISCUSSION

8. This is the latest in a long list of recent cases challenging the financial qualifications of the winning applicant. *See e.g. Charisma Broadcasting Corporation*, FCC 90R-6, released January 29, 1990. Although an applicant need not have a binding agreement in advance from a financial institution to certify in its application that it is financially qualified, *see Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require prior to such certification that the applicant have "reasonable assurance" of available funding to construct the proposed facility and operate for three months without revenue. *See* FCC Form 301, Instructions, Section III. *See Charisma*, *supra*, and cases cited in para. 3. It is also incumbent on an applicant who loses "reasonable assurance" after it has filed its application to report that fact to the Commission pursuant to Section 1.65 of the Commission's Rules. *See Belo Broadcasting Corp.* 42 FCC 2d 520 (Rev. Bd. 1973); *Tri - State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989), *recon. denied*, FCC 90R-4, released January 26, 1990. (Section 1.65 requires an applicant to amend its application within 30 days whenever the application is no longer substantially accurate and complete in all significant respects or whenever a significant change as to other matters has occurred that may be of decisional significance to the pending application.) A subsequent attempt to amend to reestablish such reasonable assurance if the filing of such amendment falls outside the period for filing amendments as of right, *i.e.*, 30 days after designation of the application for hearing, requires the applicant to also meet the "good cause" test set forth in *Erwin O' Conner Broadcasting Co.* 22 FCC 2d 140, 143 (Rev. Bd. 1970). *See generally Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989).

9. Here, following full exploration of the matter at oral argument, substantial and material questions of fact still remain concerning James River's financial qualifications in the wake of that applicant's failure to pay its prosecution expenses, McDaniel's lawsuits, and her alleged solicitation of loans. Further, there is a question whether that applicant became financially unqualified from the time the Charitys' building collapsed in September 1987 until the time Fish joined the applicant in January of 1988 and

assisted in obtaining the new bank letter. Moreover, questions are raised as to whether the applicant deliberately concealed these facts from the Commission.

10. We will deny Barbara Benns' Petition to Reopen the Record and Enlarge the Issues on character grounds at this time because the allegations it seeks to explore (local or state conflict of interest in exchanging votes for loans) are more appropriately litigated in a forum possessing the requisite expertise. *See Character Qualifications Policy Statement*, 102 FCC 2d 1179, 1204-1205 (1986) (Commission considers non-FCC misconduct only where there has been an ultimate adjudication by an appropriate trier of fact). Counsel for James River stated at oral argument that a trial on this matter was to commence on January 31, 1990. Tr. 2722. Should this matter be resolved adversely to McDaniel, appropriate subsequent steps may be taken at that time.

11. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on the following issues:

(1) To determine whether James River is, or has been continuously financially qualified since it filed its application, and, if not, the effect thereof on its basic qualifications to be a Commission licensee; and

(2) To determine whether James River has violated Section 1.65 of the Commission's Rules by failing to report material information concerning its financial qualifications, and, if so, the effect thereof on its basic qualifications to be a Commission licensee.

12. IT IS FURTHER ORDERED, That the Request to Withdraw Petition to Reopen the Record, filed August 9, 1989, by Virginia Communications Limited Partnership IS GRANTED, and the Petition to Reopen the Record, filed August 2, 1989, by Virginia Communications Limited Partnership IS DISMISSED;

13. IT IS FURTHER ORDERED, That the Motion to Dismiss for Failure to Prosecute, filed August 7, 1989, by James River Communications Corporation IS GRANTED, and the applications of Bertram Broadcasting Group (File No. BPH- 851216OM) and Greater Richmond Radio, Ltd. (File No. BPH-851216OH) ARE DISMISSED;

14. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge the Issues, filed October 5, 1989, by Barbara B. Benns IS DENIED; that the petitions for leave to amend, filed October 23 as supplemented November 3, 1989, and November 30, 1989, by James River Communications Corporation ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend, filed December 4, 1989, by Barbara B. Benns IS GRANTED, and the amendment IS ACCEPTED; and that the petition for leave to amend, filed December 19, 1989, by Penny Drucker IS GRANTED, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 8, 1990

The ninth meeting of the Systems Subcommittee of the Advisory Committee on Advanced Television Service will be held at 10:00 a.m. on February 27, 1990, in Room 856 at the FCC's offices at 1919 M Street, NW. in Washington, D.C.

The agenda for the meeting will consist of:

1. Introductory remarks
2. Approval of agenda
3. Approval of minutes from 11/28/89 meeting
4. Discussion of 3rd Interim Report
5. Discussion of Advisory Committee Meeting on 3/21/90
6. Report by Working Party 1 (Systems Analysis)
7. Report by Working Party 2 (System Evaluation and Testing)
   A. Status of System Certification
8. Report by Working Party 3 (Economic Assessment)
9. Report by Working Party 4 (System Standard)
10. Open discussion
11. Next meeting

All interested parties are invited to attend. Those interested may also submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Committee Chairman.

Any questions regarding this meeting should be directed to Bruce Franca at (202) 632-7060.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 8, 1990

Pleading Cycle Established on AT&T's Petition for Expedited Declaratory Ruling on Regulatory Policies and International Telecommunications, CC Docket No. 86-494.

On February 5, 1990, American Telephone and Telegraph Company (AT&T) filed a petition for expedited declaratory ruling, pursuant to CC Docket No. 86-494 (Regulatory Policies and International Telecommunications).

AT&T notes that a new arrangement for delivering inbound International Message Telephone Service (IMTS) has been introduced into the marketplace, whereby foreign callers use international private lines to access the U.S. domestic switched network, and the foreign caller pays only the U.S. domestic rates plus the cost of the international private line. AT&T alleges that, as a result, the foreign carrier avoids paying the accounting rate for the resulting conversation minutes. AT&T argues that these arrangements provide for non-uniform accounting and settlement rates to the detriment of U.S. carriers and, therefore, should be declared violative of the International Settlements Policy, 51 Fed. Reg. 4736 (1986), and an unreasonable practice in violation of Section 201(b) of the Communications Act.

Interested parties may file comments on this petition with the Secretary, FCC, 1919 M St., N.W., Washington, D.C. 20554, by March 5, 1990, and reply comments by March 19, 1990. Two copies should also be sent to Michael A. Mandigo, Attorney/Advisor, International Policy Division, Common Carrier Bureau, Room 534-C, 1919 M St., N.W., Washington, D.C. 20554; and one copy to the Commission's contractor for public records duplication: International Transcription Services, Inc. (ITS), Suite 140, 2100 M St., N.W., Washington, D.C. 20037. Copies of AT&T's petiton may be obtained from ITS at (202) 857-3800, or by contacting Ellen McNeil or Mary Cobbs, International Division Public Reference Room, Common Carrier Bureau, Room 533, (202) 632-7265.

For further information contact Michael A. Mandigo, International Policy Division of the Common Carrier Bureau, at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK
TELEPHONE CO.

NEW ENGLAND
TELEPHONE AND
TELEGRAPH CO.

Apparent Violations of the
Commission's Rules and Policies
Governing Transactions
with Affiliates

ORDER TO SHOW CAUSE AND NOTICE OF APPARENT LIABILITY FOR FORFEITURES

Adopted: February 6, 1990; Released: February 8, 1990

By the Commission:

I. INTRODUCTION

1. By this *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, we initiate enforcement proceedings against the telephone company subsidiaries of NYNEX Corporation (NYNEX) for apparent violations of our affiliate transaction rules and policies. These apparent transgressions arise out of the relationship between NYNEX Materiel Enterprises Company (MECO), a nonregulated, wholly-owned subsidiary of NYNEX, and NYNEX's two wholly-owned, regulated subsidiaries providing local exchange service, New York Telephone Co. (NYT) and New England Telephone and Telegraph Co. (NET). MECO was created by NYNEX at divestiture to provide centralized procurement and support services for the NYNEX group of companies, including NYT and NET. The apparent misconduct involves unreasonable markups and overcharges by MECO on sales of equipment, supplies, and services to NYT and NET: the two regulated telephone companies, in turn, recorded these artificially inflated costs on their regulated books of account, enabling the carriers to recover these costs from ratepayers through the ratemaking process. As shown herein, these actions on the part of the NYNEX subsidiaries appear to be inconsistent with our affiliate transaction rules and policies.

2. The relationship between MECO and the regulated telephone companies raises serious implications for ratepayers. Telephone consumers appear to have been subjected to unreasonable rates, reflecting excessive costs, as a result of the NYNEX subsidiaries' apparent disregard for our affiliate transaction rules and policies. Accordingly, we initiate this enforcement action in light of our statutory obligation under Section 201(b) of the Communications Act to ensure that rates charged to consumers are just and reasonable.[1] In view of these apparent violations of our affiliate transaction rules and policies, we conclude that NYT and NET paid MECO $118.5 million above and beyond the fair costs of goods and services provided to the carriers, and that as a result interstate ratepayers suffered overcharges of $35.5 million. We order NYT and NET to show cause why they should not be required to make accounting adjustments to their regulated books to reduce currently inflated balances in capital accounts to their proper levels and thus prevent further harm to interstate ratepayers in future years; why they should not be required to reduce their combined interstate revenue requirements by $35.5 million in their next access charge tariff filing with this Commission in order to return prior overcharges to interstate ratepayers;[2] and why they should not be required to make adjustments to their 1989 Annual Reports Form M to correct inaccurate Form M information submitted in 1987 and 1988. In addition, we find NYT and NET each apparently liable for forfeitures under Section 220(d) of the Communications Act [3] in the amount of $709,500 for failure to keep their regulated books of account in the manner prescribed by the Commission in Sections 31.01-11,[4] 32.27,[5] and 31.01-2(c)[6] of the rules. NYT and NET shall have thirty days to respond to these proposed regulatory actions.

II. BACKGROUND

A. The Need for Regulatory Scrutiny of Affiliate Transactions

3. Transactions between regulated utilities and their nonregulated affiliates have been subject to scrutiny by regulators in rate cases for many years. Preventing improper pricing in transactions between affiliated companies has proven to be a vexing problem in rate base, rate-of-return regulation. The Supreme Court recognized the potential for improper pricing inherent in transfers between affiliates in an opinion issued just two years after the creation of the Commission:

> At times obscurity or confusion has been born of such relations. There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. Buyer and seller in such circumstances may not be dealing at arm's length, *and the price agreed upon between them may be a poor criterion of value.*[7]

4. The underlying problem confronting regulators with respect to affiliate transactions is how to counteract the powerful incentive facing regulated companies to impose on ratepayers the costs and risks of nonregulated ventures. Transfers of goods and services between affiliates present the opportunity, through improper transfer pricing, to shift costs properly borne by the nonregulated company to the regulated enterprise for recovery from ratepayers through the ratemaking process. In such non-arm's length transactions, the prices charged for those goods and services may not bear a reasonable relation to costs. For example, the nonregulated affiliate may sell goods and services to the regulated company at artificially inflated prices; since such prices become part of the costs and rate base of the regulated carrier, they can lead to unreason-

ably high rates. The ultimate result of this abusive arrangement is supra-normal profits flowing to the nonregulated affiliate at the expense of ratepayers.

B. The Commission's Affiliate Transaction Policies and Rules

5. The Commission has long recognized the potential for cross-subsidization inherent in non-arms's length transactions between regulated telephone companies and their nonregulated affiliates. Prior to divestiture, for example, the Commission scrutinized the relationship between the then-integrated Bell System and its manufacturing and sales subsidiary, Western Electric.[8] In the pre-divestiture era, the Bell operating companies relied on Western Electric as virtually the sole source of supply for their equipment needs. The Commission was concerned that Western Electric might be exploiting its position as an essentially exclusive supplier to the Bell System by manipulating prices on sales of equipment to its affiliated Bell operating companies to the detriment of ratepayers. These non-arm's length transactions afforded Western Electric an opportunity to earn a higher rate of return by charging the captive Bell operating companies excessive prices, thereby burdening ratepayers with unreasonable rates due to rate base inflation.

6. The Commission issued the *Docket 19129 Phase II Decision* at the conclusion of its examination of the relationship between Western Electric and the Bell System and the related issue of Western Electric's earnings. That order established, in the context of the Western Electric/Bell System relationship, a prospective, formal policy governing affiliate transaction pricing and profits:

> Insofar as we find Western's risks to be comparable to those of AT&T and their respective costs of capital to be similar, we shall in the future consider disallowance from AT&T's interstate rate base the relevant portions of any excess earnings Western receives from sales to the Bell System, as represented by inflated prices paid by the Bell Operating Companies. For purposes of the above review, excess earnings shall be defined as any earnings by Western Electric on sales to the Bell System which cause its realized rate of return on net investment to exceed AT&T's prescribed return on its allowable interstate rate base. . .
>
> We shall also consider disallowances from AT&T's interstate rate base in future rate proceedings if price comparisons using competitive benchmarks show "overpayment" by AT&T for any equipment. These disallowances will be considered independently of the above-mentioned earnings standard.[9]

This policy, implemented through the ratemaking process, measured the reasonableness of prices on transactions between affiliates by reference to the prescribed rate of return of the regulated enterprise. That is, Western Electric's prices on sales of equipment to the Bell operating companies were to be deemed unreasonable if they generated earnings that caused Western's rate of return on net investment to exceed AT&T's prescribed return on its allowable interstate rate base. Thus, as to profits on sales to the Bell operating companies, Western Electric was effectively limited to AT&T's prescribed rate of return. This standard, linking the reasonableness of the nonregulated entity's prices and profits to the regulated affiliate's prescribed rate of return, served as the cornerstone of the Commission's policy governing affiliate transactions prior to the adoption of formal rules.

7. The Commission continued to rely on the ratemaking process and the basic principles established in Docket No. 19129 to monitor the reasonableness of affiliate transactions until 1987.[10] During this time period, the Commission's regulation of communications common carriers evolved from a policy requiring structural separation of nonregulated enterprises from their regulated affiliates to a framework based on accounting safeguards to ensure that ratepayers were not subjected to improper cost shifting.[11] The removal of structural separation requirements in favor of accounting safeguards granted carriers greater freedom to engage in nonregulated ventures. With this relaxation of structural separation requirements and the concomitant rise in the level of carriers' participation in nonregulated activities, the Commission perceived a need to promulgate formal rules governing all transactions between affiliates.[12]

8. Accordingly, the Commission adopted affiliate transaction rules in CC Docket No. 86-111 as an integral part of a comprehensive cost allocation scheme designed to inhibit improper cost shifting between regulated and nonregulated activities. These rules, now codified at Section 32.27,[13] became effective April 3, 1987.[14] Section 32.27 prescribes mandatory federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliate on the carrier's regulated books of account. The rules distinguish between transactions involving the transfer of assets and those involving the provision of services; the rules also establish different recording requirements depending on whether the transfer of assets is made into or out of regulation.

9. In this proceeding we are concerned with the transfer of assets and the provision of services by a nonregulated company to its regulated affiliate -- *i.e.*, transfers *into* regulation. For asset transfers into regulation, Section 32.27(b) requires the carrier to record the charge for the asset on its regulated books of account at the invoice price, if that price is determined by a prevailing price held out to the general public in the normal course of business. If no such prevailing market price is available, the carrier must record the charge for the asset at the *lower* of the nonregulated entity's net book cost or the fair market value of the asset.[15] Similarly, when a nonregulated entity provides services to its regulated affiliate, the manner in which the regulated company records these costs depends on whether the nonregulated entity engages in comparable transactions with unaffiliated third parties. When the nonregulated company provides the same service to third parties, Section 32.27(d) permits the regulated carrier to record the charge for the service at the prevailing market rate. In the absence of comparable third party transactions establishing a market rate, a carrier receiving substantially all of a service from an affiliate must record the charge for the service at the nonregulated affiliate's fully distributed cost.[16]

10. The affiliate transaction rules prescribe only the manner in which a carrier *records on its books of account* the charges for assets and services received from a nonregulated affiliate; the rules do not dictate directly the actual pricing of affiliate transactions.[17] The nonregulated enterprise remains free to charge its affiliated carrier a price in excess of the recording value prescribed by the

affiliate transaction rules. By regulating the charge at which the carrier may record the transaction, however, Section 32.27 indirectly affects the pricing and profits of the nonregulated entity. Since the regulated carrier is prohibited from recording the transaction on its regulated books at a charge greater than the value established by Section 32.27, the carrier cannot recover from ratepayers any amount actually paid in excess of this recording ceiling. Under these circumstances, a carrier recording its transactions in a manner consistent with its obligations under Section 32.27 has a strong incentive to insist that its nonregulated affiliate refrain from artificially inflating prices for goods and services. In this manner, the affiliate transaction rules inhibit cost shifting from nonregulated to regulated activities by discouraging improper transfer pricing between affiliates.

11. Moreover, under certain circumstances the affiliate transaction rules operate effectively to limit the return to the nonregulated affiliate to the prescribed rate of return of the regulated carrier. As described above, when a nonregulated entity provides a service to an affiliated carrier, and there are no substantial third party transactions establishing a market rate for the service, the carrier must record the charge for that service at the affiliate's fully distributed cost. Our cost allocation standards permit a return on investment to be included in the cost to be apportioned;[18] that return component is calculated according to the prescribed rate of return for the regulated carrier. A nonregulated enterprise whose business consists primarily of transactions with its regulated affiliates has little opportunity to increase its overall return through transactions with unaffiliated third parties, which are not subject to the affiliate transaction restrictions; thus, the nonregulated affiliate is effectively limited to achieving the regulated carrier's prescribed rate of return. In this sense, the affiliate transaction rules operate in a manner analogous to the principles established in Docket No. 19129, which gauged the reasonableness of the nonregulated affiliate's prices and profits by reference to the regulated entity's prescribed rate of return.[19]

C. NYNEX Materiel Enterprises Company

12. NYNEX Corporation created NYNEX Materiel Enterprises Company in late 1983 to provide centralized procurement and support services for the NYNEX group of companies, including NYT and NET. MECO was designed to perform much the same function for the NYNEX companies as Western Electric performed for the Bell operating companies prior to their divestiture from AT&T on January 1, 1984. The purported rationale for establishing MECO was to achieve economies of scale, that is, to reduce the prices paid for products and services by aggregating the purchase quantities of NYT, NET, and the other NYNEX affiliates to obtain volume discounts. As NYNEX's centralized procurement subsidiary, MECO provides a wide array of products and services to the NYNEX companies.

13. NYNEX chose to structure and manage MECO as a separate, profit-making venture responsible to the parent holding company. Significantly, MECO is a wholly-owned subsidiary of NYNEX Corporation; as such, MECO returns its earnings directly to NYNEX in the form of dividends. NYNEX's operating companies, NYT and NET, have no ownership interest in MECO; thus, they exert no management control over the procurement affiliate, nor do they share in MECO's earnings through receipt of dividends.[20]

14. Determining MECO's actual pricing policy toward its affiliates from 1984 through 1988 is the critical inquiry in this proceeding. MECO's *stated* pricing policy since the latter part of 1987, however, is contained in the cost allocation manual filed with this Commission by NYNEX on behalf of its telephone companies pursuant to the *Joint Cost Order*. In its original manual, filed on August 14, 1987, NYNEX proposed that the terms of MECO's transactions with its affiliates be based on "market equivalent prices."[21] The Common Carrier Bureau (the Bureau) disapproved this proposed treatment in the *NYNEX Cost Manual Order*, stating that the Commission had expressly rejected that costing methodology, and directed NYNEX to amend its manual to comply with the provisions of the affiliate transaction rules.[22] NYNEX subsequently revised its manual in March, 1988, to state that "services and supplies are recorded at fully allocated costs."[23] The Bureau found this revised treatment consistent with the affiliate transaction rules,[24] and this methodology remains MECO's stated pricing policy toward its affiliates in the current version of NYNEX's cost allocation manual on file with this Commission.[25]

D. The Common Carrier Bureau Audit

15. The Bureau had scheduled a routine audit of affiliate transactions among the NYNEX companies for 1989, but accelerated the schedule and initiated its audit in the summer of 1988 to investigate whether MECO was overcharging NYNEX's regulated telephone companies for goods and services procured on their behalf. The Bureau sought to: (1) determine if MECO's pricing policy resulted in inflated costs to NYNEX's regulated telephone companies; (2) quantify the amount of overcharges, if any, resulting from MECO's pricing policy, and what impact, if any, that policy may have had on the telephone companies' revenue requirements; and (3) determine and recommend corrective action. At the conclusion of its audit, the Bureau prepared a report which presents its findings and recommendations for our consideration.

16. The audit discloses that NYNEX's regulated subsidiaries apparently violated the Commission's affiliate transaction rules and policies in an attempt to enhance overall corporate profits for NYNEX Corp. Specifically, the audit reveals that MECO overcharged its regulated affiliates on sales of products and services, and that the regulated telephone companies, in turn, passed on excessive costs to ratepayers by improperly recording the overcharges "above the line" as regulated costs.

17. The audit establishes several important facts concerning the NYNEX purchasing arrangement. First, the audit makes clear that MECO's primary business function is procuring goods and services for NYT and NET, and for NYNEX Service Company, a subsidiary of the two regulated carriers. Sales to these three affiliates constitute the overwhelming majority of MECO's business since its inception in 1984. Sales to nonaffiliated third parties represent only a minute fraction of MECO's overall business.

18. Next, the audit discloses that MECO's return on investment for each of the five years from 1984 through 1988 far exceeded the allowable rate of return for regulated affiliates, and grew enormously over the five year period.[26] The audit further reveals that MECO achieved

this excessive return on investment through overcharges to the regulated telephone companies as a result of MECO's so-called "market based" pricing policy toward its NYNEX affiliates. Under this policy, which apparently MECO did not discontinue until late 1988 notwithstanding inconsistent statements in the NYNEX cost allocation manual, markups had a wide and inconsistent range with no discernible relationship to costs. The audit also indicates that NYNEX's corporate purchasing policy, which required the regulated telephone companies to purchase certain product lines and services through MECO in most instances, contributed to and reinforced MECO's pricing strategy.

19. Moreover, the audit reveals that MECO's total overcharges to its regulated affiliates from 1984 through 1988 were $118.5 million. Based on the telephone companies' use of the purchased items, the overcharges are apportioned between capital and expense categories, with $80.6 million capitalized and $37.9 million representing expense charges during the five year period. The burden passed on to interstate and intrastate ratepayers over this time amounted to $118.4 million, with $35.5 million representing the interstate share.[27]

20. The audit further documents that in December, 1988, in the midst of the Bureau's inquiry into MECO's transactions with the telephone companies, NYNEX Corporation advised MECO that the affiliate transaction rules adopted by the Commission in CC Docket No. 86-111 placed restrictions on telephone company transactions with MECO. NYNEX directed MECO to issue a rebate to the operating companies, and to lower its prices to NYT, NET, and NYNEX Service Company in future transactions. The rebate represented overcharges on MECO's 1988 sales to the regulated telephone companies. The rebate consisted of $42.2 million and related strictly to 1988 transactions. Of the $42.2 million total rebate, $32.7 million represented sales capitalized by the telephone companies in 1988; $9.5 million represented 1988 sales charged to expense accounts.

21. The rebate appears to have been intended to adjust MECO's 1988 prices to conform with certain interim accounting procedures (which have not been documented adequately) that NYT and NET allegedly initiated about March, 1988. These interim accounting measures consisted of recording credit entries in one representative capital account and one representative expense account, with corresponding debit entries to a "below-the-line" nonoperating account. These accrual entries represented estimates of MECO's overcharges on 1988 sales, and were designed to offset the various capital and expense accounts overstated during 1988 as a result of MECO's excessive prices. Upon receipt of the rebate, the regulated companies apparently reduced the individual overstated capital and expense accounts by making credit entries at the end of the year; the previous offsetting accrual entries in the two representative accounts, which reflected estimates of MECO's 1988 overcharges, were then reversed with corresponding debit entries. These year-end accounting adjustments were made in an effort to ensure that individual capital and expense account balances reflected costs which comport with the affiliate transaction rules.

III. DISCUSSION

A. Basis for Initiating Enforcement Proceedings

22. In reaching our decision to commence these proceedings, we have examined carefully the audit report prepared by the Common Carrier Bureau. Based on our review of the facts, findings, and recommendations contained in the Bureau's audit report, we conclude that NYT and NET appear to have violated our affiliate transaction rules and policies over several years and that the audit report provides a basis for initiating these enforcement proceedings against NYNEX's regulated telephone companies.

23. As a threshold matter, there can be no doubt that the affiliate transaction rules contained in Sections 31.01-11 and 32.27 governed transactions between the regulated telephone companies and MECO after those rules became effective on April 3, 1987. We also believe that transactions between the NYNEX affiliates prior to April, 1987, were governed by the policy announced in Docket No. 19129. In this regard, we find MECO's risks to be comparable to those faced by NYT and NET, and its cost of capital to be similar to that of the regulated telephone companies. MECO's sole source of capital is equity financing provided by NYNEX Corp., its parent holding company.[28] Moreover, NYNEX's corporate purchasing policy, which required NYT and NET to purchase certain product lines and services through MECO except in unusual circumstances, effectively established the regulated telephone companies as captive customers of MECO; this policy assured the procurement affiliate of a significant, continuous demand for its products and services, virtually eliminating the business risk that a company ordinarily faces in a competitive market with multiple suppliers. In this context, the relationship between MECO and NYNEX's regulated telephone companies bears a striking resemblance to the relationship between Western Electric and the Bell System in Docket No. 19129, and presents similar regulatory problems and concerns. Although the earnings limitation established in Docket No. 19129 related to the then-existing AT&T and Western Electric, those principles continued to represent the Commission's policy on affiliate transactions with respect to the divested components of AT&T until adoption in April, 1987, of formal rules in CC Docket No. 86-111.

24. Moreover, we tentatively conclude that purchasing goods and services at inflated prices from MECO from 1984 through December 27, 1988, constituted an unreasonable practice in violation of Section 201(b) of the Act, separate and apart from the Docket No. 19129 policies. Further; we find that NYT's and NET's conduct prior to January 1, 1988, was inconsistent with the requirements of Section 31.01-2(c) of the rules. That section, which was in effect until Part 31 was removed at the end of 1987, provided that "[a]ll charges to [Part 31 accounts] shall be just and reasonable and any payments by the company in excess of such just and reasonable charges shall be included in [a below-the-line account]."[29] NYT and NET clearly violated this requirement by recording MECO's full inflated prices in their regulated accounts, without removing those amounts paid for goods and services in excess of "just and reasonable" charges.

25. Thus, transactions between the two regulated carriers and MECO from 1984 until April 3, 1987, were subject to the earnings limitation of Docket No. 19129 and the "just and reasonable" recording requirements of

Section 31.01-2(c) of the rules; transactions from April 3, 1987 through the end of 1987 were subject to Section 31.01-2(c) and the recording and fair procurement practices requirements contained in Section 31.01-11 of the rules; and transactions from January 1, 1988, forward, were subject to the requirements of Section 32.27. During the whole period, of course, the transactions were subject to the mandate of Section 201(b) of the Act.

26. MECO's lack of transactions with nonaffiliated third parties raises significant implications regarding the application of our affiliate transaction policies and rules to the NYNEX purchasing arrangement. Since MECO dealt primarily with its regulated affiliates during the five year period, the manner in which NYT and NET recorded the costs of those transactions was governed by the rules promulgated in CC Docket No. 86-111, and prior to adoption of those rules, the carriers were subject to the policy established in Docket No. 19129 regarding earnings levels of affiliates. Under these circumstances, our affiliate transaction policies and rules operate effectively to limit MECO's earnings on sales to NYT and NET to the allowable return of the regulated telephone companies.[30]

27. MECO's "market based" pricing policy for sales to its regulated affiliates generated earnings that caused its return on investment greatly to exceed the allowable return of the regulated telephone companies. By their strict adherence to a corporate policy requiring them to purchase products and services from MECO at artificially inflated prices, NYT and NET facilitated MECO's improper pricing strategy and enhanced its excessive earnings; by including those artificially inflated costs in their rate bases and revenue requirements, NYT and NET appear to have burdened ratepayers with unreasonable rates from 1984 through 1988; by recording those artificially inflated costs on their regulated books of account, NYT and NET appear to have violated our affiliate transaction rules from April 3, 1987, through December 27, 1988, and Section 31.01-2(c) prior to January 1, 1988.

28. We acknowledge the measures undertaken by NYNEX and its regulated telephone subsidiaries during the course of the Bureau's audit in 1988 purportedly in an attempt to comply with our affiliate transaction rules. As the audit disclosed, NYT and NET established interim accounting procedures to record estimates of 1988 MECO overcharges; NYNEX subsequently ordered MECO to issue a $42.2 million rebate to the operating companies for those excess charges and to lower its prices to its regulated affiliates in future transactions. We have taken these steps into account in developing the proposed remedial measures and enforcement action outlined below.

29. However, we emphasize that the interim accounting procedures and rebate, which related only to 1988 transactions, do not address overcharges imposed on the telephone companies and passed on to ratepayers during the prior four years.[31] We also believe that these actions do not address harm inflicted on ratepayers *in 1988*. While these steps may have enabled the regulated companies essentially to comply with our *accounting* standards by the end of 1988,[32] they do not resolve the 1988 *ratemaking* consequences associated with the NYNEX purchasing arrangement – the telephone companies' 1988 tariffs continued to reflect MECO's prior overcharges. This is due to the manner in which carriers develop their access tariff filings. Tariffs in effect during 1988 were based on carriers' submissions filed in the fall of 1987. The carriers' submissions, in turn, were based on budget projections and cost estimates developed earlier in 1987. Since NYNEX did not direct MECO to return excess charges until December, 1988, NYT and NET would not have anticipated this rebate and incorporated it into access tariffs developed and submitted in 1987; thus, their tariff submissions necessarily were grounded on MECO's prior, excessive prices. We conclude that, despite the accounting adjustments and rebate initiative, the telephone companies' tariffs imposed unreasonable costs on ratepayers in 1988, as well as the prior four years.[33] The remedial measures outlined below reflect this understanding.

B. Proposed Remedial Measures and Enforcement Action

30. Our proposed regulatory response to these apparent violations of our affiliate transaction rules and policies is fourfold. First, we propose to require NYT and NET to reduce their capital account balances by an amount representing the artificially inflated portion of previously capitalized plant and equipment still reflected on the telephone companies' regulated books. This accounting adjustment is necessary due to the unique impact of capital costs on the ratemaking process. Whenever a capital cost is included in the rate base, the regulated company earns a return on that investment in the year it is recorded; significantly, however, that capital cost *remains* in the rate base, subject only to reductions for depreciation expense, enabling the company to earn a return on the undepreciated portion of the investment in subsequent years as well. Capitalized investment also generates additional depreciation expense and related tax expense in subsequent years. Capital costs thus have a cumulative effect on the ratemaking process, unlike expenses, which may be recovered from ratepayers only in the year incurred. Therefore, unreasonable capital costs improperly included in the rate base have a harmful impact on ratepayers over many years. Removing unreasonable capital costs from the regulated books of account will provide prospective relief for ratepayers, freeing them from the burden of unreasonable rates in future years caused by inflated rate bases.

31. In its audit report, the Bureau quantified total excessive capital costs currently embedded in the accounts of NYT and NET at $32.6 million.[34] Accordingly, we order NYT and NET to show cause why they should not be required to reduce their capital account balances by this amount.[35]

32. Second, we must take remedial action to recover overcharges imposed on ratepayers in prior years as a result of the apparent violations by NYT and NET of the applicable affiliate transaction requirements. As described above, a regulated company earns a return each year on the undepreciated portion of any investment included in its rate base. Unreasonable capital costs, whether first recorded on the company's books in the current year or carried over from prior years, inflate a carrier's rate base and thus generate an inflated return on investment for the current year. Moreover, a regulated company is entitled to recover its expenses in the year incurred; unreasonable expense charges, including charges for depreciation, inflate a carrier's revenue requirement for that particular year as well. In light of NYT's and NET's accounting of purchases from MECO, ratepayers appear to have been subjected in prior years to unreasonable rates reflecting improper capital costs and expense charges recorded by the carriers on their regulated books of account. In order to promote equity and to make interstate ratepayers

whole, we propose to require a one-time reduction of interstate revenue requirements for NYT and NET in their next access charge tariff filing with this Commission. This ratemaking adjustment will represent apparent overcharges imposed on ratepayers in past years as a result of the artificially inflated rate bases and unreasonable expense charges generated by the NYNEX purchasing arrangement.

33. In its audit report, the Bureau quantified improper returns previously earned on the inflated portions of the carriers' rate bases and unreasonable expense charges recovered in prior years in the aggregate amount of $35.5 million, including interest.[36] Accordingly, we order NYT and NET to show cause why they should not be required to reduce their combined interstate revenue requirements by this amount in their next access charge tariff filing.

34. Third, we propose to require NYT and NET to adjust their 1989 Annual Reports Form M to correct inaccurate Form M information submitted in 1987 and 1988. The Form M reports contain comprehensive accounting and financial information compiled on an annual basis for regulatory analysis. It is clear that the carriers' 1987 and 1988 Form M entries were not accurate because the costs of assets and services received from MECO were recorded on the carriers' books of account according to a valuation methodology that conflicted with the requirements of Sections 31.01-11 and 32.27. Failure to abide by the recording requirements of these sections necessarily distorts accounting and financial data embodied in the carriers' Form M reports on file with this Commission. The carriers' conduct in this regard calls into question the integrity of their Form M reports for 1987 and 1988. We must insist that carriers file accurate and complete accounting and financial information in accordance with our rules if we are to discharge faithfully our regulatory responsibilities. Accordingly, we order NYT and NET to show cause why they should not be required to make correcting adjustments to their 1989 Annual Reports Form M to remedy inaccurate entries on their 1987 and 1988 reports.[37]

35. Fourth, we find NYT and NET each apparently liable for forfeitures in the amount of $709,500 under Section 220(d) of the Communications Act for failure to keep their regulated books of account in the manner prescribed by the Commission in Sections 31.01-11, 32.27, and 31.01-2(c) of the rules. This amount represents a forfeiture of $500 for each day within the statute of limitation period that NYT and NET failed to account for their transactions with MECO according to the requirements of those rules. This period began on February 8, 1985, and continued through December 27, 1988, one day prior to the date the companies came into effective compliance.[38] We direct NYT and NET to pay the specified forfeitures or to respond in writing as to why forfeiture penalties should not be imposed or should be reduced. Any showing as to why the forfeitures should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent.[39]

36. Finally, Section 220(c) of the Communications Act provides that "[t]he burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry . . . ."[40] Accordingly, in their response hereto, NYT and NET bear the burden of proving that their accounting entries related to transactions with MECO complied with the Commission's affiliate transaction rules and policies. NYT and NET shall have thirty days from release of this *Order to Show Cause and Notice of Apparent Liability for Forfeitures* in which to respond.

IV. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, 220(a), and 220(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-203, 205, 215, 217-219, 220(a), and 220(c), and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701 (1988), that New York Telephone Co. and New England Telephone and Telegraph Co. shall SHOW CAUSE within thirty days why they should not be required to make the accounting adjustments described above.

38. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, 220(a), and 220(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-203, 205, 215, 217-219, 220(a), and 220(c), and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701 (1988), that New York Telephone Co. and New England Telephone and Telegraph Co. shall SHOW CAUSE within thirty days why they should not be required to make the revenue requirement reductions described above in their next access charge tariff filing with this Commission.

39. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 219, 220(a), and 220(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 219, 220(a), and 220(c), and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701 (1988), that New York Telephone Co. and New England Telephone and Telegraph Co. shall SHOW CAUSE within thirty days why they should not be required to make adjustments to their 1989 Annual Reports Form M to correct inaccurate Form M information submitted in 1987 and 1988.

40. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 220(d), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. §§ 1.80(f) (1988), that New York Telephone Co. and New England Telephone and Telegraph Co. are each APPARENTLY LIABLE FOR FORFEITURES in the amount of $709,500 for failure to comply with Section 220 of the Act and Sections 31.01-2(c), 31.01-11, and 32.27 of the Commission's Rules, 47 C.F.R. §§ 31.01-2(c), 31.01-11 (1987), and 47 C.F.R. § 32.27 (1988).

41. IT IS FURTHER ORDERED that New York Telephone Co. and New England Telephone and Telegraph Co. shall, within thirty days of the release date of this notice, pay the full amount of the forfeitures currently outstanding as of that date or file a response showing why the proposed forfeitures should not be imposed or should be reduced.[41] If the forfeitures are not paid, the response should include supporting evidence sufficient to rebut in full the tentative conclusions described in this notice. *See* 47 C.F.R. § 1.80(f)(3) (1988).

42. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of this *Order to Show Cause and Notice of Apparent Liability for Forfeitures* and a copy of the Common Carrier Bureau audit report to New York Telephone Co., 1095 Avenue of the Americas,

New York, New York, 10036; and to New England Telephone and Telegraph Co., 185 Franklin Street, Boston, Massachusetts, 02107.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 201(b).

[2] The proposed $35.5 million reduction represents the *interstate* portion of apparently excessive revenue requirements that NYT and NET have recovered from ratepayers since 1984 as a result of the NYNEX purchasing arrangement. The derivation of this figure is contained in n.27, *infra*.

[3] 47 U.S.C. § 220(d).

[4] 47 C.F.R. § 31.01-11 (1987).

[5] 47 C.F.R. § 32.27 (1988). Section 32.27 replaced Section 31.01-11 on January 1, 1988, and is virtually identical to its predecessor.

[6] 47 C.F.R. § 31.01-2(c) (1987).

[7] AT&T v. United States, 299 U.S. 232, 239 (1936) (emphasis added).

[8] *See* AT&T, Charges for Interstate Telephone Service, Docket No. 19129 (Phase II), 64 FCC 2d 1 (1977) (*Docket 19129 Phase II Decision*), *recon.*, 67 FCC 2d 1429 (1978).

[9] *Id.* at 80, paras. 208-209 (footnotes omitted).

[10] *See, e.g.*, AT&T, Regulatory Treatment of Preoperational Expense Incurred by Western Electric Co. Relating to the Development of Customer Premises Equipment, 102 FCC 2d 35, 47-50 (1985) (analyzing the reasonableness of Western Electric's CPE prices to the BOCs, and its return on net investment, under the principles of Docket No. 19129); AT&T, 91 FCC 2d 578, 604-607 (1982).

[11] *See, e.g.*, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, *modified on recon.*, 84 FCC 2d 50 (1980), *modified on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190 (released May 4, 1984) (collectively, *Computer II*); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988); 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *modified on recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988); Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities, CC Docket No. 86-111, *Notice of Proposed Rule Making*, 104 FCC 2d 59 (1986) (*Joint Cost NPRM*), *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988), *appeal pending sub nom.* Southwestern Bell Corp. v. FCC, No. 87-1764 (D.C. Cir.) (pet. for rev. filed Dec. 14, 1987).

[12] Under the *Computer II* regime, certain carriers were required to reduce to writing and file with the Commission the terms and conditions of transactions with their affiliated Computer II subsidiaries (providing enhanced services or CPE). *See* 47 C.F.R. § 64.702(c)(5). This rule, however, applied only to companies subject to structural separation, and only to transactions involving the Computer II subsidiary. *See Joint Cost NPRM*, 104 FCC 2d at 93, para. 76.

[13] The affiliate transaction rules were codified originally in 1987 at Section 31.01-11 as part of the Uniform System of Accounts (USOA) then contained in Part 31 of our rules. *See* 47 C.F.R. §31.01-11 (1987). With the adoption of the revised USOA embodied in Part 32 and the concurrent removal of Part 31, effective January 1, 1988, the affiliate transaction rules are now codified at Section 32.27. *See* 47 C.F.R. § 32.27 (1988).

[14] *See* 52 Fed. Reg. 6557, 6558 (1987).

[15] 47 C.F.R. § 32.27(b) (1988).

[16] 47 C.F.R. § 32.27(d) (1988). For a more extensive discussion of the requirements of § 32.27(d), *see* Centel Corporation, Petition for Clarification of Section 32.27(d) of the Commission's Rules Governing the Valuation of Services Provided to a Telephone Carrier by an Affiliated Company, 4 FCC Rcd 2241 (Com.Car.Bur. 1989) (*Centel Clarification Order*).

[17] *See* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978, 5981, para. 27 (Com.Car.Bur. 1988) (*NYNEX Cost Manual Compliance Order*). *See also* 47 C.F.R. § 32.27(a) (1988).

[18] *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6298, para. 133. *See also Centel Clarification Order*, 4 FCC Rcd at 2241, n.6.

[19] *See* para. 6, *supra*.

[20] This is in contrast to the purchasing arrangements established by several other regional Bell holding companies (RHCs), which formed centralized procurement affiliates as subsidiaries of *their regulated operating companies*. While establishing a procurement affiliate as a wholly-owned subsidiary of the operating companies may reduce the coercive influence of the holding company, it does not eliminate concerns over the potential to manipulate pricing in transfers of goods and services between the procurement entity and its parent regulated telephone companies.

[21] NYNEX Cost Allocation Manual at 41 (August 14, 1987).

[22] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 81, 84, para. 26 (Com.Car.Bur. 1988) (*NYNEX Cost Manual Order*). As discussed at para. 9, *supra*, a transfer of assets or services into regulation may be recorded at the prevailing market rate only when that rate is established through substantial transactions with nonaffiliated third parties. So-called "market equivalent prices" unsupported by third party transactions are unacceptable under the affiliate transaction rules. *See* 47 C.F.R. § 32.27(b), (d) (1988).

[23] NYNEX Cost Allocation Manual at 61 (Revised March 14, 1988).

[24] *NYNEX Cost Manual Compliance Order*, 3 FCC Rcd at 5981, para. 27.

[25] *See* NYNEX Cost Allocation Manual at VI-17 (Revised December 30, 1988).

[26] The Bureau constructed a "rate base" for MECO for each of the five years in question in order to make the necessary return on investment calculations.

[27] The $118.5 million in overcharges represents the amount MECO earned over the five year period beyond that which it would have earned had its profits been limited to the NYNEX telephone companies' authorized rate of return. MECO's overcharges to the telephone companies do not equate to the burden imposed on ratepayers, however, since the excessive costs incurred by NYT and NET for capital items ($80.6 million) have not been passed through to consumers in toto. The telephone companies may only recover these capital costs by depreciating the assets over time; thus, ratepayers do not bear these costs until the companies include appropriate depreciation charges in their revenue requirements. Our calculations indicate that the companies' total revenue requirement overstatement from 1984 through 1988, including both *interstate and intrastate* components, totals $118.4 million, with interest. The $118.4 million revenue requirement overstatement represents the actual burden imposed on interstate and intrastate ratepayers over the relevant period, and includes, *inter alia*, those capital costs actually recovered by the carriers through depreciation charges. The interstate portion of this overstatement is $35.5 million. *See* n. 2, *supra*. We employed a separations factor of .3 to compute the interstate portion; this separations factor is a composite figure derived from information provided by NYT and NET in their 1988 ARMIS reports to the Commission.

[28] *See Docket 19129 Phase II Decision*, 64 FCC 2d at 78, para. 203 & n.105 (expressly affirming the conclusions of the Administrative Law Judge regarding the similarity of risk of Western Electric and the Bell System, in part because Western Electric obtained all its equity financing from the latter and was a creature of the latter, 64 FCC 2d 131, 185, para. 138 (1976)).

[29] 47 C.F.R. § 31.01-2(c) (1987).

[30] *See* paras. 6, 11, *supra*.

[31] Apparently, NYNEX calculated this rebate based on the requirements of Section 32.27. As discussed above *(see* para. 8 and n.13), the predecessor to Section 32.27 became effective April 3, 1987; thus our affiliate transaction rules governed transactions between MECO and its regulated affiliates during most of 1987 as well as all of 1988. Although the rebate appears intended to correct for overcharges which conflict with the operation of the affiliate transaction rules, the rebate does not reflect those overcharges imposed on NYT and NET in 1987 after the rules became effective, nor does it address overcharges for the period from 1984 to 1987 governed by the earnings limitation policy developed in Docket No. 19129.

[32] We tentatively conclude that the regulated NYNEX telephone companies did not come into effective compliance with our affiliate transaction rules until December 28, 1988, when NYT and NET adjusted *individual capital* and expense account balances upon receipt of price rebates from MECO; the carriers' interim accounting measures do not constitute effective compliance with the requirements of the affiliate transaction rules.

[33] The rebate does prove helpful in reducing prospective harm to consumers, since the cost reductions should be reflected in budget projections and cost estimates used to develop the carriers' future tariff submissions.

[34] This excludes excessive 1988 capital costs resolved by the telephone companies' accounting adjustments and rebate initiative in 1988.

[35] *See* 47 C.F.R. §1.701 (1988).

[36] We emphasize that the proposed $35.5 million reduction represents only the interstate portion of the carriers' prior overstated revenue requirements. We have no jurisdiction over any overstatement properly attributed to the *intrastate* ratemaking process.

[37] The carriers' Annual Reports Form M for 1989 are due to be filed with this Commission no later than March 31, 1990. *See* 47 C.F.R. § 43.21 (1988).

[38] To be precise, the forfeiture is computed at $500 per day for 1419 days.

[39] *See* 47 C.F.R. § 1.80(f)(3) (1988).

[40] 47 U.S.C. § 220(c).

[41] Such forfeiture amounts should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington, D.C., 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C., 20554.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE CO.

MATERIEL ENTERPRISES CO.

Request for Confidential Treatment
of Certain Financial Information

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1990; Released: February 8, 1990

By the Commission:

1. New York Telephone Co. (NYT) and Materiel Enterprises Co. (MECO), wholly-owned subsidiaries of NYNEX Corporation (NYNEX), request confidential treatment of certain financial information submitted to Commission staff during a recent Common Carrier Bureau audit of affiliate transactions among NYNEX companies. At the conclusion of its audit, the Common Carrier Bureau (Bureau) prepared a report which contains findings, conclusions, and recommendations concerning MECO's transactions with NYT and New England Telephone and Telegraph Co (NET). The Bureau's audit report necessarily is based on certain financial information submitted by NYT and MECO which is subject to their requests for confidentiality. The audit report presents in summary fashion certain financial and operating data concerning NYT and MECO. For the reasons set forth below, we authorize the Bureau to release the audit report to the public pursuant to Section 220(f) of the Communications Act of 1934, as amended.[1]

2. Section 0.459 of the Commission's Rules provides that any party submitting information to the Commission may request that such data be held confidential.[2] A party seeking confidential treatment of its data submission must demonstrate by a preponderance of the evidence that nondisclosure is consistent with the provisions of the Freedom of Information Act (FOIA). [3] The confidentiality requests submitted by NYT and MECO are grounded in Exemption 4 of the FOIA,[4] and the Commission's implementing rules, Section 0.457(d).[5] Exemption 4 and, in turn, Section 0.457(d) of the Rules, permit the Commission to withhold from inspection "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial materials are held to be confidential when disclosure would be likely to, *inter alia*, cause the party submitting those materials substantial competitive harm.[6]

3. To justify withholding data under Exemption 4, it is not necessary to show actual competitive harm. Rather, the entity or person seeking confidentiality of the data must show that substantial competitive injury is likely to result from disclosure.[7] While an elaborate economic analysis need not be made to establish the likelihood of substantial competitive injury, "conclusory and generalized allegations" cannot support nondisclosure.[8] Moreover, public embarrassment, unfavorable publicity, or customer disgruntlement are not generally considered to constitute substantial competitive harm.[9]

4. Assuming that NYT and MECO face competition in the areas covered by the audit, a matter we need not decide here, we conclude that release of the audit report is not likely to result in substantial competitive harm. The report does not contain the specific, underlying financial information submitted by NYT and MECO during the course of the audit; rather, the report contains only data and financial information presented in summary form. The data and information contained in the report are a result of the staff's analysis, manipulation, and aggregation of the underlying data and information submitted by NYT and MECO. The summary nature of the information contained in the report diminishes significantly the likelihood that NYT and MECO would suffer substantial competitive injury as a result of disclosure of the audit report. For instance, while the audit report shows MECO's return on investment for the years 1984 through 1988 and MECO's revenues from particular NYNEX companies, these figures would not be especially useful to any competitors in pricing their own products or services or devising competitive initiatives to challenge MECO since such information is not related to individual products. Although the audit report displays the levels of mark-ups for various product lines, even this information does not pertain to specific products within a general grouping. Moreover, the competitive utility of such data is further diminished since the reported mark-ups encompass such a wide range.

5. In any event, in the circumstances, and given the diminished likelihood of substantial competitive harm, we believe that disclosure of the audit report is in the public interest. The audit report serves as the basis for an *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, which initiates an enforcement proceeding against NYT and NET for violations of the Commission's affiliate transaction requirements.[10] Ratepayers have a vital interest in the conduct and outcome of these enforcement proceedings. Transactions between regulated telephone companies and their nonregulated affiliates, such as the transactions at issue in the audit report, may lead to unreasonable rates and burden consumers when ratepayer safeguards are not obeyed. Release of the audit report will serve to inform interested state regulatory commissions and consumers concerning the implications of MECO's relationship with NYT and NET with respect to rates.[11]

6. We note that this *Order* does not evaluate the sufficiency of NYT's and MECO's confidentiality requests with respect to the raw financial data on which the audit report is based, because the issue has not been raised. To the extent that NYT's and MECO's requests for confidentiality may be construed as an objection to the disclosure of the aggregate financial and operating data contained in the report, we deny NYT's and MECO's requests.

7. Pursuant to Section 0.459(g) of the Commission's Rules,[12] NYT and MECO will be afforded five working days in which to seek a judicial stay of this Commission ruling. We direct the Chief, Common Carrier Bureau, immediately upon Commission adoption of this order, to furnish by telephone to NYT and MECO notice of our determination and of the time for seeking judicial stay, as well as follow up notice in writing and a copy of the audit report.

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459 (1988), that the requests of New York Telephone Co. and Materiel Enterprises Co. for confidential treatment of certain financial information submitted in connection with the Common Carrier Bureau audit ARE DENIED to the extent necessary to release the financial and operating data contained in the Bureau's audit report.

9. IT IS FURTHER ORDERED, pursuant to Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j), that a copy of this *Order* and the audit report shall be served upon New York Telephone Co. and Materiel Enterprises Co.

10. IT IS FURTHER ORDERED, pursuant to Section 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(f), and Section 0.459(g) of the Commission's Rules, 47 C.F.R. § 0.459(g) (1988), that the Common Carrier Bureau is authorized to release the audit report for public inspection on the sixth working day following service of the report upon New York Telephone Co. and Materiel Enterprises Co.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 220(f).

[2] 47 C.F.R. § 0.459 (1988).

[3] 47 C.F.R. § 0.459(d) (1988).

[4] 5 U.S.C. § 552(b)(4).

[5] 47 C.F.R. § 0.457(d) (1988).

[6] National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*). Under *National Parks I*, material also may be withheld in instances where disclosure would be likely to impair the government's ability to obtain necessary information in the future. The Communications Act grants the Commission specific authority to obtain and inspect the type of financial information at issue here. 47 U.S.C. § 220(c). *See also* 47 U.S.C. §§ 215, 218, and 219 (regarding the Commission's authority to obtain information from affiliates of regulated carriers). There appears to be no threat to our information-gathering abilities here because the Commission has explicit statutory authority to obtain the information at issue.

[7] *See* Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir. 1979); *National Parks I*, 498 F.2d 765.

[8] National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 680-81 (D.C. Cir. 1976) (*National Parks II*).

[9] CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987); General Electric Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984).

[10] *See* New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, FCC 90-57 (released February 8, 1990).

[11] Commission audit reports concerning common carriers generally are not available for public inspection. However, the Commission has had occasion to release audit reports in the past based on public interest considerations. *See, e.g.*, Preliminary Audit and Study of Operation of International Carriers and Their Communications Services Between the United States and Overseas and Foreign States, 75 FCC 2d 726 (1980); Monitoring Compliance with Conditions Underlying General Telephone and Electronics Corporation's Acquisition of Telenet, 78 FCC 2d 403 (1980). The Commission has authority to release audit reports pursuant to 47 U.S.C. § 220(f).

[12] 47 C.F.R. § 0.459(g) (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

NORTHWESTERN TELEPHONE SYSTEMS, INC. File No. W-P-C-6370

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to establish and operate a fiber cable system between Kalispell, Missoula and Missoula Junction, Montana, for the provision of interstate switched access and special access services.

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: January 31, 1990; Released: February 15, 1990

By the Chief, Common Carrier Bureau:

1. Before the Bureau is the above-captioned application filed by Northwestern Telephone Systems, Inc. (NTS) pursuant to Section 214 of the Communications Act of 1934 (Act), 47 U.S.C. § 214, and Section 63.01 of the Commission's rules and regulations, 47 C.F.R. § 63.01. NTS seeks authority to construct and/or operate a fiber optic cable system between Kalispell and Missoula and between Kalispell and Missoula Junction, all in the State of Montana, for the purpose of providing interstate Switched Access and Special Access services. The application appeared on public notice January 11, 1989. Ronan Telephone Company, Inc. (Ronan) filed a petition to deny the application and NTS replied. For the reasons set forth herein, we grant the application.

I. APPLICATION

2. According to NTS, interstate interexchange carriers currently are accessing its switching facilities in Kalispell via leased capacity in a 1200 circuit analog microwave system that is owned by NTS and US West Communications (US West).[1] The capacity of this microwave system, NTS states, is near exhaustion. Therefore, it proposes to replace its portion of the microwave system with the proposed fiber optic facilities and extend service to Missoula and Missoula Junction. Upon completion of the fiber system, NTS states, interstate interexchange carriers will be able to access its network at Missoula and Missoula Junction. In the application, NTS specifically seeks authority to construct and operate three DS-3 (44.736 Mbps) digital channels in order to provide 1,344 equivalent voice circuits between Kalispell and Missoula Junction and 672 equivalent voice circuits between Kalispell and Missoula. It expects an interexchange carrier to lease the facilities between Kalispell and Missoula Junction and it plans to use the facilities between Kalispell and Missoula for routing its Special Access traffic between these points. To implement its proposal, NTS contends that its costs will be approximately $2,244,369, which compares favorably with constructing a new digital microwave radio system at a cost of $2,350,000. The points of contention between NTS and Ronan are (1) whether Ronan is a party in interest; (2) whether NTS has engaged in unauthorized premature construction; (3) whether NTS' application is deficient and (4) whether the public interest would be served by grant of the application.

II. PLEADINGS AND DISCUSSION

3. *Party in interest.* Ronan claims to be a party in interest because it uses the existing microwave system to serve Ronan, Montana and the surrounding areas, and to connect its exchange to the national network. Because it believes the proposed facilities will replace the existing system, it alleges it will be forced to use the new facilities and to negotiate terms from a disadvantaged position due to a lack of alternative facilities. Therefore, it requests that the application be denied or, in the alternative, that NTS be required to offer it an Indefeasible Right of Use agreement at reasonable prices, terms and conditions.

4. NTS rebuts Ronan's interest claim by noting that Ronan is served by facilities owned by US West and the American Telephone and Telegraph Company (AT&T), and therefore sees no need for Ronan to use the proposed facilities. Besides, it states, these carriers interconnect with Ronan at its central office and no explanation has been offered as to why this relationship would be severed as a result of the subject proposal. Furthermore, NTS believes that Ronan has available at least one alternative service provider should its relationship with US West and AT&T be terminated.

5. In its reply, Ronan reiterates its earlier position and adds that, although it has described anticipated harm, it is not required to do so to be a party in interest, citing *Southern Pacific Communications Co. v. AT & T*, 556 F. Supp. 825, 881 (D.C. Cir. 1982), *aff'd* 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). While it says that gaining an interest in the facilities would assuage its fears, Ronan also asserts that is not the basis for its petition. It believes that NTS "will be able to use its proposed facilities to exert monopoly control over access to and from [Ronan's] exchange," and "such control does not serve the public convenience and necessity." Ronan Reply at p. 6. Thus, Ronan asks that the application be denied. In the alternative, Ronan requests that grant of the application be conditioned to require NTS to establish an Indefeasible Right of Use for Ronan's use of facilities on the proposed system, or to require NTS to lease it capacity on the system at the same rates AT&T receives, citing *Western Union v. FCC*, 541 F.2d 346 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

6. *Discussion.* In *Telenet Communications Corp.*, 74 FCC 2d 561, 566-67 (1979), the Commission stated that "[t]o meet the requirement under Rule Section 63.52(c), that a petitioner be a party in interest, it is sufficient for the petitioner to allege facts which, if proven, would indicate a possibility that the petitioner would suffer some adverse impact." Ronan may be required to alter the interconnections it currently relies on as a result of the proposed construction. In addition, Ronan may be required to use NTS' system, a consequence arguably constituting an

"adverse impact" upon Ronan if a rate change followed. We therefore find that Ronan's petition is sufficient to establish standing for purposes of this proceeding.

7. *Unauthorized construction.* In its petition to deny, Ronan contends that NTS has withheld relevant information which would show that a grant of the subject application would disserve the public interest, convenience and necessity. According to Ronan, NTS has violated the Act by commencing construction of its system without prior Section 214 authority. In an affidavit, the president of Ronan states he has observed this unauthorized construction and has spoken with the construction crews on a portion of the project.

8. NTS, in response, contends that the policy regarding Section 214 certification for installation of facilities in a single state by a local exchange carrier is unclear. It believes that Section 214 authority is unnecessary for installation of cable facilities which will be used to carry intrastate service even though these facilities later may be used to provide interstate services. It notes that the facilities under construction between Kalispell and Missoula initially are to be used solely for intrastate service. However, as currently envisioned, upon completion of a second cable between Missoula and Missoula Junction, interstate service will be provided. NTS explains that its discussion regarding the Kalispell-to-Missoula link was provided "to give the Commission a complete overview of the project, [and that] construction of the link which will tie the local exchange facilities of [NTS] to a connecting IXC (i.e., the Missoula to Missoula Junction segment) has not yet begun and is not scheduled until the spring of 1990." NTS Opposition at p. 3. Therefore, it contends that its application seeks authority to construct the second link of its system and to use the first link in conjunction with the second to provide interstate service.

9. In its reply, Ronan notes that Section 214 of the Act forbids the construction of a new line of communications without first obtaining Commission authority and that the proposed undertaking is subject to Section 214. At note 1 of its reply, Ronan argues that:

> It seems clear that NTSI will be recovering a portion of the costs of its facilities through interstate access charges. While the relationship between Section 214 certification requirements and a carrier's operation pursuant to interstate access tariffs has not been directly addressed by the Commission, the Petitioner asserts that a direct relationship does exist. It therefore occurs to the Petitioner that the "connecting carrier" provisions of Section 2(b)2 of the Act became meaningless with the implementation of interstate access charges and tariffs.

Ronan Reply at p. 2. Thus, Ronan concludes that NTS' argument that the facilities will be used solely for intrastate service is rebutted by NTS' own representations.

10. Ronan also challenges NTS' argument that the Commission's Section 214 policy is unclear. It asserts that if NTS is suggesting that the Commission lacks jurisdiction in the matter, it is incorrect. Citing *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) and *General Telephone Company of California v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), Ronan alleges the Commission's jurisdiction in such matters turns on facilities use and not location, *i.e.*, if the facilities are to be used to carry interstate services it does not matter that the physical plant is located in a single state; the Commission must approve the project. NTS, according to Ronan, has stated that the facilities will be used to render interstate service and that construction has commenced without the appropriate prior authority.

11. *Discussion.* Ronan's allegation of unauthorized construction by NTS does not support denial of the application. Section 214 speaks to prior Commission certification of any interstate construction of lines of communications by telephone companies subject to the Act. Section 214 reads in pertinent part:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . . .

As a general proposition, then, telephone companies require Section 214 authority prior to construction or operation of any interstate line of communications.[2]

12. The regulation of common carrier communication services is bifurcated between state and federal authorities. Section 2(a) of the Act sets forth the Commission's jurisdiction over communications services, *i.e.*, the regulation of interstate and foreign communications. Section 2(b)(1) of the Act deprives the Commission of jurisdiction of carriers' charges, classifications, practices, services, *facilities*, or regulations with respect to their provision of intrastate services. 47 U.S.C. §§ 152(a) and 152(b)(1). Thus, with certain exceptions noted in Sections 224 and 301 and Title VI of the Act, the Commission generally lacks jurisdiction over intrastate communication facilities and services. In short, the Commission's regulatory powers under Section 214 are not applicable to the construction of facilities intended to be used strictly for the provision of intrastate communication services.

13. NTS represents that the facilities under construction between Kalispell and Missoula were intended initially to be used to offer intrastate services. It now seeks Commission authority to provide interstate services over these facilities but in conjunction with additional -- proposed --facilities between Missoula and Missoula Junction.[3] The bifurcated regulatory scheme of the Act does not preclude construction of facilities later used for both interstate and intrastate communication services as long as the interstate use of the lines does not occur prior to acquisition of necessary federal authority. NTS notes it has commenced construction under the assumption that its intrastate plans fall outside federal jurisdiction, and it does not plan to offer interstate service until it has received appropriate Commission approval. While NTS' initial application is at best unclear as to phasing of the project -- seeking authority to construct and operate the entire project and describing it as proposed -- the record contains no evidence that NTS' subsequent explanation is not correct. We are therefore unable to conclude that NTS has improperly commenced construction of interstate facilities.

14. *Deficient application.* Ronan contends that NTS' application fails to disclose information required by the rules, Sections 63.01(a) and (b), by omitting information regarding Blackfoot Telephone Cooperative, Inc.'s (BTCI) role in the ongoing installation of fiber optic facilities between Kalispell and Missoula. According to Ronan, Section 2(b)(2) does not excuse BTCI from Commission jurisdiction because the facilities are for interstate service. In addition, Ronan charges that Section 63.01(g) requires NTS to show that the existing facilities provide channel capacity to other local exchanges, including Ronan's. Without this information, Ronan contends, the Commission would be unable to assess the impact of NTS' decision to replace existing facilities or the intended use of the proposed facilities. Moreover, it argues that the lack of information required by Sections 63.01(h) and (i) precludes an assessment of whether NTS has over-estimated the cost of the facilities or is proposing to construct more than three times the capacity indicated in the application.

15. In response to its alleged failure to identify BTCI as a co-applicant, NTS states that BTCI is acting as a contractor for the installation of a portion of the initial intrastate cable facility. NTS relates that it is the sole owner of the plant and, therefore, no other owner exists requiring identification under Subsections 63.01 (a), (b) and (d) of Section 63.01. With regard to Ronan's claim that NTS neglected to disclose that the existing facilities provide capacity to other local exchange carriers (LECs), NTS argues that the charge is misleading and incorrect. NTS states that Attachment A of its application illustrates that its existing analog microwave radio system makes a "mid-air interconnect" with US West's microwave system between Blacktail Mountain and Charlo Mountain, both located in Montana, and that its portion of the system does not provide service to the exchanges cited by Ronan. In NTS' view, "[i]t is not a requirement of the Commission's Rules for NTSI to attempt to identify the facilities between other LECs and their connecting toll carriers." NTS Opposition at p. 5.

16. *Discussion.* Ronan's charge that the application is deficient is not supported. NTS has satisfied all of the requirements of Section 63.01. Subsections 63.01(a) and (b) require only information from applicants for authorization to provide interstate service. Given the phasing of the project as eventually disclosed by NTS, BTCI does not appear to be a participant in the construction of an interstate facility. As noted above, carriers may, without prior Commission authority, construct cable or fiber optic facilities which may at a future time carry both interstate and intrastate services if those facilities are limited to intrastate service when constructed. In any event, BTCI's participation in the project has been fully documented, and NTS' representations that BTCI will play no role in the operation of the facility are unchallenged.

17. Section 63.01(g) requires an applicant to list existing circuits between major points on each principal route. NTS indicates that there is an analog microwave radio system between Kalispell and Missoula which interstate interexchange carriers already use to access NTS' switching facilities at Kalispell. This system, it has stated, is designed to handle 1200 equivalent voice circuits and NTS expects this capacity to be exhausted at the end of 1989. In addition, it notes that the segment of the system it owns does not serve Ronan. On the basis of the record, we cannot conclude that NTS' response fails to comport with the requirements of Section 63.01.[4]

18. *Public Interest.* Finally, Ronan urges the Commission to find that NTS' application does not serve the public interest, convenience and necessity. Ronan states that it and Hot Springs Telephone Company (Hot Springs) use approximately 170 circuits of the existing system's 1200 circuit capacity. When the proposed facilities are completed, Ronan claims that NTS will abandon its portion of the microwave system and US West likely will not continue operating its segment of the microwave system to handle just Ronan and Hot Springs' traffic. It also argues that NTS has not demonstrated that projected demand will approach the capacity of the proposed system. On this basis, Ronan concludes that it will be in an inequitable negotiating position for capacity on NTS' fiber optic system, and that users of the system could incur inflated costs.

19. In response, NTS states that the existing microwave facilities are near exhaustion. As of February 1989, it claims, only 17 circuits remain idle on the entire 1200 circuit system. Moreover, it again notes that its microwave system does not serve Ronan, and that Ronan's connection to the public switched network is via interexchange carriers' interfaces at Ronan's central office. According to NTS, these interexchange carriers do not use NTS' facilities to serve the Ronan exchange. Therefore, it argues, there is no basis for Ronan to claim it has no choice other than to enter negotiations with NTS.

20. With regard to capacity, NTS explains that although the design of the proposed system accommodates possible use of the facilities by Ronan and other local exchange carriers, it is principally engineered to meet capacity estimates for growing private line, video, government, education, resale and new digital service needs. It believes appropriate justification for constructing the facilities is supplied in the application and that the cost estimates are correct. Moreover, it argues, the proposal has no direct bearing on Ronan's operations.

21. NTS asserts it disclosed the actual and planned capacity of the proposed facilities. As to the purported inflated costs, NTS maintains that the customers of all other exchange carriers served by the existing microwave facilities referenced by Ronan would bear no such costs because they are not current NTS customers and the new facilities are to meet NTS' requirements for all its customers, not just for one potential customer, *i.e.*, Ronan. NTS also notes that the incremental cost of additional fibers is a small percentage of the overall project cost and that the incremental cost can be estimated only after projecting service requirements over the useful life of the system. In any event, NTS states, its immediate needs were disclosed in the application.

22. *Discussion.* Section 214 requires the Commission to find that the proposed construction and operation of new lines by a carrier is required by the public convenience and necessity. The proposed facilities will be utilized to replace analog radio equipment that is approaching saturation. Moreover, the fiber facility will permit NTS to offer digital technology to its customers. There is no indication in the record that the existing microwave facilities which serve Ronan and are provided by US West are being replaced. Ronan's allegation that US West may dismantle its microwave facilities is unsupported. For that matter, it is not clear that Ronan would be disadvantaged even if US West dismantled its microwave system; Ronan does not challenge NTS' assertion that Ronan has access to at least one additional carrier other than US West and

AT&T. Should Ronan find it necessary to use NTS' new facilities, NTS is required as a common carrier subject to the Commission's jurisdiction to provide service to all users at reasonable rates, terms and conditions under appropriate tariffs. NTS indicates that its services will be available pursuant to the TUECA [Interstate] Access Tariff, as well as NTS Tariff PSC Montana No. 11, PSC Montana AC-2, and carrier lease agreements. Moreover, NTS' interstate services are fully subject to the complaint provisions of Title II of the Act.[5] There is no basis for imposing extraordinary conditions regarding availability of capacity.

23. As to NTS' cost estimates and system capacity, NTS has demonstrated that the capacity of its analog microwave system is insufficient to meet its present and future needs. In fact, in its opposition, NTS relates that as of February 1989 only 17 of the system's 1200 circuits remain available as spares. NTS' circuit projection for 1989 indicates a need for 1,476 circuits and 2,016 during 1990.[6] Obviously, the existing system design cannot accommodate these requirements. NTS had considered replacing the analog radio system with a digital one, but found it more cost effective to use fiber optic cable instead. The cost estimates for employing fiber optic cable are $2,244,369, against $2,350,000 for a digital radio system. The capacity of the fiber facilities greatly exceeds that of the digital radio system NTS considered. With the availability of such additional capacity, NTS can provide all of the services described in its submissions at costs substantially less than were it to install new microwave facilities. In sum, we find no merit to Ronan's argument that the public interest will be disserved by grant of NTS' application.

24. In view of the foregoing, we find that the public convenience and necessity require or will require the construction and operation of the proposed fiber optic cable. We note, however, that the authority granted herein does not permit NTS to install and operate facilities in excess of the circuit requirement stated in the application. In addition, the costs associated with the project are subject to the separations requirements of Part 36 of the rules, 47 C.F.R. Part 36.

25. Accordingly, IT IS ORDERED, that the petition to deny filed by Ronan Telephone Company, Inc. IS DENIED.

26. IT IS FURTHER ORDERED, that the captioned application of Northwestern Telephone Systems, Inc. IS HEREBY GRANTED.

27. This order is issued under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The record indicates that NTS owns and operates microwave facilities between Kalispell and Blacktail Mountain, Montana, whereas US West owns and operates the facilities between Charlo Mountain and Missoula, Montana.

[2] Neither NTS nor Ronan argues that Section 2(b)(2) exempts NTS from Section 214. In Contel of Indiana, Inc., File No. W-P-C-6064, released July 12, 1988, at para. 8, the Bureau stated that "[t]he Commission determined shortly after the Communications Act was adopted that any telephone company claiming connecting carrier status has the burden of establishing that it is covered by the exemption." *See* Intra State Telephone Company, 3 FCC 172 (1936); Rochester Telephone Corp. v. United States, 23 F. Supp. 634, 636 (1938), *aff'd* 307 U.S. 125 (1939).

[3] NTS states the facility will carry interstate interexchange telephone traffic, special access and video services.

[4] Section 63.01(g) does not require applicants to identify facilities serving other carriers' spur exchanges. *See* 47 C.F.R. §§ 63.01(f) and 63.01(g). Section 63.505, for applications to discontinue service, does request that type of information; however, NTS has not filed to discontinue service. *See* 47 C.F.R. §§ 63.505(d) and 63.505(f).

[5] We note, however, that it is unclear from the record whether Ronan's use of existing facilities is interstate in nature. If not, any concerns it has regarding cost allocation should be addressed to the Public Service Commission of the State of Montana. Ronan's concerns with regard to NTS' interstate costs and service rates may be addressed in NTS' tariff filings with the Commission. *See* discussion, *infra*, at para. 24.

[6] Ronan does not question NTS' demand projections, but rather NTS' proposal to satisfy such demand with fiber facilities capable of accommodating demand in excess of such projections.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-55

In the Matter of

Amendment of Part 97 of the	RM-6984 RM-6985
Commission's Rules Concerning	RM-6986 RM-6987
the Establishment of a Codeless	RM-6988 RM-6989
Class of Amateur Operator License.	RM-6990 RM-6991
	RM-6992 RM-6993
	RM-6994 RM-6995

NOTICE OF PROPOSED RULE MAKING

Adopted: February 8, 1990; Released: February 16, 1990

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose to establish a new class of amateur operator license that would not require the applicant to prove that he or she can send and receive manual Morse code telegraphy messages. This proceeding was initiated by twelve petitions for rule making filed on matters generally relating to the amateur operator license class structure, requirements, and privileges.[1]

II. BACKGROUND

2. The amateur service exists for the purpose of self-training, intercommunication and technical investigations carried out by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[2] Article 32 of the international Radio Regulations requires, among other things, that each person seeking a license to operate the apparatus of an amateur station prove that he or she has the ability to send correctly by hand and to receive correctly by ear text in Morse code signals. Although this requirement may be waived for an operator of an amateur station transmitting only on frequencies above 30 MHz[3], each of the five classes of operator licenses issued by the Commission[4] requires the applicant to pass an examination in the international Morse code.[5]

3. Over the years, the Commission has received requests from persons who want to pursue the purposes of the amateur service, but who argue that Morse code telegraphy is an unnecessary barrier to obtaining a license. Historically, however, the amateur community has strongly supported a telegraphy skill requirement for every class of amateur operator license. In a 1974 rule making proceeding[6], and again in a 1983 rule making proceeding[7], amateur licensees showed nearly unanimous opposition to proposals for a no-code license.

4. In the 1974 rule making proceeding, we proposed an overall restructuring of the classes of amateur operator license. Included in those proposals was the establishment of a codeless class of license. Although it resulted in several improvements to the license structure, the proceeding was terminated without action on the codeless license class.[8] It was during the pendency of this proceeding that the computer-aided license application processing system currently in use was developed. The capability for processing a sixth class of license, therefore, was incorporated into the design for the system. In the 1983 rule making proceeding, the Commission again sought ways to provide a class of codeless license. One proposal was the deletion of the slow speed telegraphy examination requirement for the Technician Class license.[9] The alternative proposal was a new operator license class patterned after a Canadian codeless class of amateur license, and having very difficult written examination requirements. This proceeding was also strongly opposed by the amateur community and was terminated without action.[10] The above-listed petitions initiating this proceeding, however, indicate that the sentiment in the amateur community now appears to favor a codeless license class. The ARRL, for example, states that it now supports a codeless license as being "beneficial to the future, short and long term, of the Amateur Service."[11] The issue of a codeless class of amateur operator license, therefore, should be considered in light of current circumstances in the amateur service.

III. DISCUSSION

5. A significant segment of the amateur community has a new view of the role of telegraphy in the future of the service. David Stall states that "numerous recent surveys have demonstrated that the concept of a no-code license is rapidly attracting a wide base of support within the amateur community."[12] The ARRL states that its recent studies show:

> Encouraged by changes in the FCC rules, packet radio and other digital modes have become extremely popular and have led to amateur radio becoming increasingly attractive to computer-literate individuals who possess the ability to contribute significantly to the service, but who fail to perceive the relevance of manual Morse code. Many amateurs welcome the idea of providing a gateway to these individuals. The possibility now exists to dispassionately evaluate a codeless amateur license on its own merits. It is this factor that accounts for what the League perceives as a significant shift in attitudes among amateurs toward a codeless amateur license.[13]

6. The SCATG states that the time is right for a codeless class of license:

> Morse code operations were once the only way to make radio communications possible. It is now just a facet of an entire spectrum of possible methods of radio communications. It is no longer in keeping with the basis and purpose of the Amateur Radio service to stress one facet of radio communications over all others. Knowledge of code doesn't eliminate rules violations or uncourteous operations.[14]

7. Burt Fisher, a teacher of electronics at a regional high school, states "the public need would best be served if there were a door into amateur radio that had a limited code requirement. Once in the door, these youngsters would be tempted to the rest of the world (and technology) of amateur radio. The public would be served as the base of potential scientists and technicians would be enhanced...." He believes that a written examination could be used to ascertain that an entry level license applicant has knowledge of telegraphy.[15] Michael Trahos believes that it is essential to have a codeless beginner license so that the amateur service will not stagnate or experience a decrease in the number of licensees. He believes that if a codeless license is not established, the number of licensed amateur operators will decrease, with a consequent increasing re-allocation of amateur service spectrum by the Commission to the land mobile services.[16]

8. John McCord believes a codeless class of license would "attract many young minds to the hobby of amateur radio...."[17] Dennis and Linda Welch find the issue of a codeless class of license contentious and defended mostly by the older amateurs and championed by the very population needed for expansion.[18] Bill Welsh, who has a personal preference for code operation, foresees "that its years as a realistic amateur radio licensing requirement are coming to an end."[19] James E. Taylor states that telegraphy is no longer necessary and that the number of amateur operators must be drastically increased in order to "continue to justify our existence."[20] Clement Bourgeois, however, disagrees. He states that a knowledge of telegraphy by every amateur operator is essential. He does believe, however, that the high speed telegraphy examination[21] should be reduced to 15 words-per-minute or less.[22] Larry Ballentine suggests that telegraphy examinations only require the examinee to recognize telegraphy characters, rather than to send and receive text at specific rates of speed.[23]

9. *Operator license structure*. The petitions espouse various views on the structure of the license ladder. The general consensus, however, is that a codeless class of license should be the beginning step on the ladder. The ARRL believes that there is nothing antiquated or irrelevant about the Morse code, or its use in the Amateur Radio Service, but that this is a "matter that *some* individuals must learn for themselves, in order to appreciate that relevance."[24] Most of the petitions favor a structure that avoids any negative effect upon any current licensee. One approach would add a sixth class of operator license. David Stall recommends this approach, with the sixth class modeled after the Novice Class, without the telegraphy requirement. He believes that a codeless license should provide "a no-code entry into amateur radio without disrupting the existing classes, privileges, or incentives."[25] Burt Fisher also favors the sixth class approach,[26] as does ARRL, with the codeless class positioned in the license structure so that there is an upward path "to the present Technician license by way of a five words per minute Morse code examination...."[27]

10. Another approach taken in the petitions is to preserve the current five class structure by conversion of the Novice Class to a codeless class. John McCord, for example, recommends elimination of the telegraphy requirement for the Novice license.[28] In addition to conversion of the Novice Class, Dennis and Linda Welch also suggest a merger of the Technician and General Classes.[29] The SCATG recommends that the Novice Class be gradually replaced by a non-renewable codeless class that would "minimally disrupt the existing license structure to avoid disenfranchising current licensees. ... [t]he new license should avoid isolating the newcomer from the mainstream of amateur radio operators and operations while maintaining the incentive to upgrade and providing attractive privileges for the newcomer...."[30]

11. Other petitions suggest major revisions to the license class structure. James Taylor states that prospective amateur operators "are put off by the present complex, layered structure of our hobby...." He suggests one all-purpose operator class.[31] Alan Horowitz suggests "a no-code ham license, similar to Canada's license structure."[32] Michael Trahos, however, states that "[t]he Canadian no-code experience has clearly shown that creation of a no-code license class with examination requirements greater than that of the lowest available code license class fails to promote interest in, or insignificantly increases, the number of licensed amateur radio operators."[33] He suggests, instead, two new codeless classes.[34] Bill Welsh believes that emission mode privileges should be earned "by passing written and on-the-air operating tests that are directly related to the desired additional emission/mode privilege being sought."[35] He suggests that all frequency segments now offered as incentives be eliminated.[36]

12. *Operator privileges*. The petitions generally concur that, as a minimum, a station control operator holding a codeless class of license be authorized all emission privileges on the 1.25 meter (m) and shorter wavelength bands. For the longer wavelength bands, however, there are several views, starting with James Taylor's recommendation that all possible privileges be authorized to the codeless class.[37] Michael Trahos and SCATG recommend including the 6 m and 2 m bands.[38] Burt Fisher recommends authorizing the 52-54 MHz segment in the 6 m band. He also recommends including the 2 m band, but excluding emission F3E on that band.[39] The ARRL recommends excluding operation on both the 6 m and 2 m bands.[40] Dennis and Linda Welch,[41] David Stall,[42] and John McCord make recommendations similar to those of the ARRL. John McCord, however, suggests including digital type emission privileges on the 6 m and 2 m bands.[43]

13. The petitions recommend that the eligiblity for the codeless class of license, like all amateur operator licenses, require the passing of a written examination. The ARRL states that the written examination should reflect the privileges to be earned and require a greater commitment than does the present Technician class written examination. It believes that the lessons learned from codeless license programs in other countries necessitate a significant written examination. The ARRL recommends, therefore, that a written examination for the codeless license be administered under the Volunteer Examiner Coordinator (VEC) system. The ARRL also recommends a 60 question written examination consisting of the current 55 question written examination for the Technician Class Operator license, augmented by five additional questions related to the specific privileges afforded the codeless licensees. Two of the new questions would be concerned with the application and use of telegraphy and the remainder would be concerned with digital communication techniques.[44] The SCATG states that the written examination should consist of 50 questions.[45]

14. The petitions also suggest names for a new codeless class of license. The SCATG suggests "Apprentice."[46] Burt Fisher suggests "Novice-V."[47] Michael Trahos suggests "Novice-Plus" and "Technician-Plus."[48] David Stall suggests "Limited."[49] The ARRL states that its suggested name "Communicator," although "not exactly reflective of the type of license envisioned in the proposal... is, however, the most descriptive among those alternatives considered."[50]

IV. PROPOSAL

15. We believe that the petitions have merit. Further, like the petitioners, we believe that this is a propitious time to propose the establishment of a codeless license, given the advances in electronic communications in the past few years. We propose, therefore, to establish a codeless class of amateur operator license, the Communicator Class. With respect to this proposed operator class, we have established three objectives. Our first objective is to offer an entry level license opportunity to all persons who find the telegraphy requirement a barrier to pursuing the purposes of the amateur service. Our view is best expressed by the statement of the ARRL that "the goal of the codeless amateur license is to bring such licensees into the 'mainstream' of the Amateur Radio Service, and to encourage them to upgrade their license class."[51] Our second objective is to propose a type of license that can be implemented quickly if a decision is made to proceed. Our third objective is to avoid any negative effect upon current licensees, upon the work of the volunteer examiners, or upon the Commission's workload or resources. To preclude any impact on our resources, it is imperative that our existing computer-aided application processing system be utilized "as is."[52] The proposed rule amendments are contained in the attached Appendix.

16. In proposed Sections 97.501 and 97.503(b)(1), we would require that the applicant for a Communicator Class license pass a 60 question written examination, as requested by ARRL. In sum, there would be an expanded entry level examination and corresponding question pool. We concur with ARRL that the written examination for the Communicator Class license should correspond to the privileges for that class of license.[53] The new question pool would be comprised of the questions from the two pools currently used in the Novice and Technician license examinations, and new questions as requested by ARRL.[54] By incorporating existing questions, over 91 percent of the question pool for a Communicator Class license would already be available and would help facilitate a smooth transition.[55]

17. *Operator license structure*. In proposed Section 97.9, we would incorporate the Communicator Class in a simplified license structure containing four ascending steps: Communicator, General, Advanced, and Amateur Extra Classes. Current Technician and Novice Class operator licenses would be grandfathered indefinitely. There would be no new licenses issued for those license classes, but existing licenses could be modified or renewed. This approach would meet the objectives we established in paragraph 15. Dennis and Linda Welch, John McCord, and SCATG suggested preserving the five-step ladder by eliminating the telegraphy examination requirement from the Novice class license. This approach deserves careful consideration by the amateur community because of its simplicity. We did not propose this approach because of its disadvantage of lowering the license qualification standards for the Novice operator class. As such, it may be unacceptable to the hundreds of thousands of amateur operators, including the 85,000 current Novice Class licensees, who qualified for the Novice license by passing a telegraphy examination. The Novice Class has operating privileges below 30 MHz, necessitating the need for a knowledge of telegraphy as described in paragraph 2.

18. For future licensees, the Communicator Class license would be the first step in the license structure instead of the Novice Class. Our premise is that most newcomers to the service, given the choice, would elect to qualify for the Communicator Class license rather than the Novice Class license. There would, therefore, no longer be a need for the Novice Class license. We particularly invite instructors, volunteer examiners (VEs), and VECs to submit comments on the validity of this premise, including factual information on the time and effort that would be required for persons to prepare for the proposed 60 question Communicator Class written examination as compared to the time and effort currently required for the Novice Class 30 question written examination and telegraphy examination.

19. Because the written examination for the Communicator Class license would be more comprehensive than that of the Technician Class license, the Communicator Class would also serve in the stead of the Technician Class for future licensees. Each step in the proposed four step structure provides recognition that the holder has significantly advanced his or her skills in both the communication and technical phases of the radio art.[56] This structure could be rapidly implemented. The present license application processing system and license application form would continue to be used.[57]

20. *Operator privileges*. The proposed control operator privileges of the Communicator Class would generally be those suggested by the ARRL. The privileges would include all authorized emission types. The proposed transmitter power standard would be 200 watts peak envelope power. The licensee's station would be eligible for a Group D call sign.[58] Stations with Communicator Class control operators would not be permitted to transmit on the 2 m and 6 m bands. In view of ARRL's desire to bring the codeless class into the mainstream of the amateur service,[59] however, we particularly invite comment on the effect of excluding Communicator Class licensees from these two popular bands.

21. The ARRL stated that one premise for its petition was that an accommodation should be made for codeless class licensees to upgrade their license class. It cited countries that have codeless licenses where the written examination tests the examinee's technical qualifications. The ARRL stated that amateur service societies in countries such as Australia, the Federal Republic of Germany, and Belgium report ongoing telegraphy activities among the codeless class licensees working to upgrade the license class.[60] While the proposed Communicator Class privileges include telegraphy on the 1.25 meter and shorter wavelength bands, we recognize that telegraphy operation is more closely associated with the HF bands. The opportunity for newcomers to the amateur service actually to send and receive messages in the Morse code on small segments of the HF 80, 40, 15, and 10 meter bands is provided to the Novice and Technician Classes so that those operators can gain an appreciation of telegraphy and acquire the proficiency needed to pass the telegraphy

examination for the General Class operator license. We specifically request comments, therefore, concerning the desirability of including the opportunity for Communicator Class licensees also to experience on-the-air telegraphy operation on the HF bands. In view of our obligation under the provisions of the international Radio Regulations,[61] if it is desired, only domestic communications on the HF bands would be authorized.

22. Under proposed Section 97.301(g), a Communicator Class licensee who passes, or otherwise receives credit for a telegraphy examination, would be authorized the additional privileges of the Technician Class.[62] To avoid a license processing burden, however, the documentation of the passing of, or credit for, a telegraphy examination would be evidenced by the Certificate of Successful Completion of Examination (CSCE) issued by the administering VEs,[63] rather than by the issuance of a Technician Operator license. The indicator used by the Communicator Class for identification purposes would be AC.[64] Under proposed Section 97.505(a)(1), VEs would be authorized to grant examination credit, evidenced by a CSCE, to a Communicator Class examinee for the slow speed telegraphy examination when the examinee holds a Novice Operator license.[65] That combination, Communicator Class license and CSCE, would permit the Communicator Class licensee the same rights and privileges of the Technician Class operator. The VECs would provide listings, in paper or magnetic form, of the Communicator Class licensees who have been issued the CSCE.

23. *Volunteer examiners.* The instant proposal contains substantive changes in the amateur operator license examination procedure and the issuance of amateur operator licenses and CSCEs. All operator license examinations would be administered under the VEC system.[66] The additional task of administering the Communicator Class license would be offset by the elimination of other tasks, including the discontinuance of the two examiner system for the Novice Class license.[67] The coordination and oversight by the VECs provide more credible results than does the two examiner system. In the latter, examination administration errors are more common and cheating is a greater problem than in the VEC system. The task of administering new Technician Operator Class licenses would also be discontinued.[68] The Novice and Technician written examinations would no longer be prepared and administered as separate examinations. The VEs and VECs, moreover, could be reimbursed for out-of-pocket costs incurred in connection with all examinations.[69]

V. CONCLUSION

24. We believe that this proposal would achieve the objectives set forth in paragraph 15 above. We seek comments, therefore, on the proposed revisions to Part 97 to establish a Communicator Class Operator license for the amateur service, as set forth in the attached Appendix.

VI. PROCEDURAL MATTERS

25. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

26. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

27. Any person who is making an oral *ex parte* presentation and presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

28. Authority for issuance of this *Notice* is contained in Sections 4(i) and 303(l) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(l) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 6, 1990,** and reply comments on or before **September 7, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments must state the proceeding to which they relate (PR Docket Number). They should be sent to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

29. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities, because these entities may not use an amateur station to transmit any communication the purpose of which is to facilitate the business or commercial affairs of any party. *See* 47 C.F.R. § 97.113(a). Moreover, the proposed rules would not require the use of or significantly enhance the sale of any additional amateur station apparatus.

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to increase the information collection burden which the Commission imposes on the public. This proposed increase in the information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

31. A copy of this *Notice* will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulation is proposed to be amended as follows:

.1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 301-609, unless otherwise noted.

2. Section 97.9 is revised to read as follows:

§ 97.9 Operator license.

(a) The classes of operator licenses are Communicator, General, Advanced, and Amateur Extra. There are also two grandfathered classes of operator licenses, Novice and Technician. An operator license authorizes the holder to be the control operator of a station with the privileges of the operator class specified on the license. The license document or a photocopy thereof must be in the personal possession of the licensee at all times when the person is the control operator of a station.

(b) A person holding a Communicator Class operator license and who holds a CSCE indicating that the person passed element 1(A), 1(B), or 1(C) is authorized to exercise the rights and privileges of the Technician Class for the duration of the license term and renewal thereof.

(c) A person holding a Novice, Technician, Communicator, General, or Advanced Class operator license who has properly filed with the FCC an application for a higher operator class that has not yet been acted upon, and who holds a CSCE indicating that the person passed the necessary examinations within the previous 365 days is authorized to exercise the rights and privileges of the higher operator class.

3. Section 97.17(a) is revised to read as follows:

§ 97.17 Application for new license.

(a) Any qualified person is eligible to apply for an amateur service license. No new Novice or Technician Class operator licenses will be issued.

* * * * *

4. Section 97.119(e) is revised to read as follows:

§ 97.119 Station identification.

* * * * *

(e) When the control operator is using privileges on the basis of holding a CSCE, an indicator must be included after the call sign as follows:

(1) AC for Communicator Class operator;

(2) AG for General Class operator;

(3) AA for Advanced Class operator; or

(4) AE for Amateur Extra Class operator.

* * * * *

5. Section 97.301(a) is revised and a new paragraph (g) is added to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(a) For a station having a control operator holding a Technician, Communicator, General, Advanced or Amateur Extra Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
VHF	**MHz**	**MHz**	**MHz**	
1.25 m	---	222-225	---	(a),(b),(e)
UHF	**MHz**	**MHz**	**MHz**	
70 cm	430-440	420-450	420-450	(a),(b),(f)
33 cm	---	902-928	---	(a),(b),(g)
23 cm	1240-1300	1240-1300	1240-1300	(j)
13 cm	2300-2310	2300-2310	2300-2310	(a),(b),(j)
-do-	2390-2450	2390-2450	2390-2450	(a),(b),(j)
SHF	**GHz**	**GHz**	**GHz**	
9 cm	---	3.3-3.5	3.3-3.5	(a),(b),(k),(l)
5 cm	5.650-5.850	5.650-5.925	5.650-5.850	(a),(b),(m)
3 cm	10.00-10.50	10.00-10.50	10.00-10.50	(b),(c),(i),(n)
1.2 cm	24.00-24.25	24.00-24.25	24.00-24.25	(a),(b),(i),(o)
EHF	**GHz**	**GHz**	**GHz**	
6 mm	47.0-47.2	47.0-47.2	47.0-47.2	
4 mm	75.5-81.0	75.5-81.0	75.5-81.0	(b),(c),(h)
2.5 mm	119.98-120.02	119.98-120.02	119.98-120.02	(k),(p)
2 mm	142-149	142-149	142-149	(b),(c),(h),(k)
1 mm	241-250	241-250	241-250	(b), (c), (h), (q)
---	above 300	above 300	above 300	(k)

* * * * *

(g) For a station having a control operator holding a Technician, General, Advanced or Amateur Extra Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
VHF	**MHz**	**MHz**	**MHz**	
6 m	---	50-54	50-54	(a)
2 m	144-146	144-148	144-148	(a)

6. Section 97.501 is revised to read as follows:

§ 97.501 Qualifying for an amateur operator license.

An applicant must successfully pass an examination for the issuance of a new amateur operator license and for each change in operator class. Each applicant for the class of operator license specified below must pass, or otherwise receive examination credit for, the following examination elements.

(a) Amateur Extra Class operator: Element 1(C), and elements 3(A), 3(B), 4(A), and 4(B);

(b) Advanced Class operator: Element 1(B) or 1(C), and elements 3(A), 3(B), and 4(A);

(c) General Class operator: Element 1(B) or 1(C), and elements 3(A), and 3(B);

(d) Communicator Class operator: Element 3(A).

7. Paragraphs (b) and (c) of Section 97.503 are revised to read as follows:

§ 97.503 Element standards.

* * * * *

(b) A written examination must be such as to prove that the examinee possesses the operational and technical qualifications required to perform properly the duties of an amateur service licensee. Each written examination must be comprised of a question set as follows:

(1) Element 3(A): 60 questions concerning the privileges of a Communicator Class operator license. The minimum passing score is 45 questions answered correctly.

(2) Element 3(B): 25 questions concerning the additional privileges of a General Class operator license. The minimum passing score is 19 questions answered correctly.

(3) Element 4(A): 50 questions concerning the additional privileges of an Advanced Class operator license. The minimum passing score is 37 questions answered correctly.

(4) Element 4(B): 40 questions concerning the additional privileges of an Amateur Extra Class operator license. The minimum passing score is 30 questions answered correctly.

(c) The topics and number of questions required in each question set are listed below for the appropriate examination element:

Topics	Element: 3 (A)	3 (B)	4 (A)	4 (B)
(1) FCC rules for the amateur radio services	15	4	6	8
(2) Amateur station operating procedures	7	3	1	4
(3) Radio wave propagation characteristics of amateur service frequency bands	4	3	2	2
(4) Amateur radio practices	11	5	4	4
(5) Electrical principles as applied to amateur station equipment	6	2	10	6
(6) Amateur station equipment circuit components	4	1	6	4
(7) Practical circuits employed in amateur station equipment	3	1	10	4
(8) Signals and emissions transmitted by amateur stations	4	2	6	4
(9) Amateur station antennas and feed lines	6	4	5	4

8. Section 97.505(a) is revised to read as follows:

§ 97.505 Element credit.

(a) The administering VEs must give credit as specified below to an examinee holding any of the following documents:

(1) An unexpired (or within the renewal grace period) FCC-issued Novice Class operator license: Element 1(A) and the 30 written questions in Element 3(A) based upon the material from the written examination passed for the Novice Class operator license.

(2) An unexpired (or within the renewal grace period) FCC-issued Communicator Class operator license: Element 3(A).

(3) An unexpired (or within the renewal grace period) FCC-issued Technician Class operator license: Element 3(A).

(4) An unexpired (or within the renewal grace period) FCC-issued Technician Class operator license issued before March 21, 1987: Elements 3(A) and 3(B).

(5) An unexpired (or within the renewal grace period) FCC-issued General Class operator license: Elements 1(B), 3(A), and 3(B).

(6) An unexpired (or within the renewal grace period) FCC-issued Advanced Class operator license: Elements 3(A), 3(B), and 4(A).

(7) A CSCE: Each element the CSCE indicates the examinee passed within the previous 365 days.

(8) An unexpired (or expired less than 5 years) FCC-issued commercial radiotelegraph operator license or permit: Element 1(C).

* * * * *

9. Section 97.507 is revised to read as follows:

§ 97.507 Preparing an examination.

(a) Each telegraphy message and each written question set administered to an examinee must be prepared by a VE holding an FCC-issued Amateur Extra Class operator license. A telegraphy message or written question set, however, may also be prepared for the following elements by a VE holding an FCC-issued operator license of the Class indicated:

(1) Element 3(B): Advanced Class operator.

(2) Elements 1(A) and 3(A): Advanced or General Class operator.

(b) Each question set administered to an examinee must utilize questions taken from the applicable question pool.

(c) Each telegraphy message and each written question set administered to an examinee for a Communicator, General, Advanced or Amateur Extra Class operator license must be prepared, or obtained from a supplier, by the administering VEs according to instructions from the coordinating VEC.

(d) A telegraphy examination must consist of a message sent in the international Morse code at no less than the prescribed speed for a minimum of 5 minutes. The message must contain each required telegraphy character at least once. No message known to the examinee may be administered in a telegraphy examination. Each 5 letters of the alphabet must be counted as 1 word. Each numeral, punctuation mark and prosign must be counted as 2 letters of the alphabet.

10. In Section 97.511, the heading and the text are revised to read as follows:

§ 97.511 Operator license examination.

(a) Each session where an examination is administered must be coordinated by a VEC. Each administering VE must be accredited by the coordinating VEC.

(b) Each examination for a Communicator Class operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra or Advanced Class operator license.

(c) Each examination for a General, Advanced or Amateur Extra Class operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra Class operator license.

(d) The administering VEs must make a public announcement before administering an examination. The number of candidates at any examination may be limited.

(e) The administering VEs must issue a CSCE to an examinee who scores a passing grade on an examination element.

(f) Within 10 days of the administration of a successful examination, the administering VEs must submit the application to the coordinating VEC.

11. Section 97.513 is removed.

12. In Section 97.519, new paragraph (d) is added to read as follows:

§ 97.519 Coordinating examination sessions.

* * * * *

(d) Each coordinating VEC must compile lists of Communicator Class operator licensees who have been issued a CSCE for Element 1(A), 1(B), or 1(C) during each calendar month. The VEC must forward a copy of the list to the Private Radio Bureau, FCC, Washington, DC 20554, by the 10th day following the end of the month.

13. Section 97.527 is amended by revising paragraph (a), removing paragraph (c) and redesignating paragraphs (d) (e) (f) and (g) as (c) (d) (e) and (f) to read as follows:

§ 97.527 Reimbursement for expenses.

(a) VEs and VECs may be reimbursed by examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating an examination.

* * * * *

FOOTNOTES

[1] The petitions were received from the American Radio Relay League, Inc. (ARRL) (RM-6995), Larry Ballentine (RM-6991), Clement Bourgeois, Jr. (RM-6988), Burt Fisher (RM-6989), Alan Horowitz (RM-6984), John M. McCord (RM-6993), the Space Coast Amateur Technical Group (SCATG) (RM-6986), David K. Stall (RM-6994), James E. Taylor (RM-6985), Michael C. Trahos (RM-6990), Dennis and Linda Welch (RM-2987), and Bill Welsh (RM-6992). Subsequent to the Public Notice listing of the foregoing petitions, two additional petitions addressing the same matter were received from Larry Garens and Philip Howard. These petitions are included in the record of this notice and comment proceeding and will be given full consideration prior to a final determination in this matter.

[2] *See* No. 53 of the International Telecommunication Union Radio Regulations (Geneva, 1979) (hereafter Radio Regulations). *See also* 47 U.S.C. § 153(q).

[3] *See* No. 2735 of the Radio Regulations.

[4] The license classes are, in ascending steps, Novice, Technician, General, Advanced and Amateur Extra.

[5] The examinations cover three levels of telegraphy skill. They are 5, 13, and 20 words-per-minute. The examinee must also pass certain written examination elements, depending upon the operator license class sought. *See* Sections 97.501 and 97.503 of the Commission's Rules, 47 C.F.R. §§ 97.501 and 97.503.

[6] *Notice of Proposed Rule Making*, Docket No. 20282, 39 Fed. Reg. 44042 (1974).

[7] *Notice of Proposed Rule Making*, PR Docket No. 83-28, 48 Fed. Reg. 4855 (1983).

[8] *Third Report and Order*, Docket No. 20282, 44 Fed. Reg. 16461 (1979).

[9] The qualification requirements for a Technician Class Operator license are passing the five words-per-minute telegraphy examination, the 30 question written examination for a Novice Class Operator license, and the 25 question written examination for a Technician Class Operator license.

[10] *Report and Order*, PR Docket No. 83-28, 49 Fed. Reg. 1097 (1984).

[11] RM-6995 at 21.

[12] RM-6994 at 3.

[13] RM-6995 at 12 and 13, N. 11.

[14] RM-6986 at 3.

[15] RM-6989 at 1 and 2.

[16] RM-6990 at 5.

[17] RM-6993 at 2.

[18] RM-6987 at 1.

[19] RM-6992 at 1.

[20] RM-6985 at 1.

[21] The highest speed telegraphy requirement is 20 words-per-minute for the Amateur Extra Class operator license.

[22] RM-6988 at 2 and 3.

[23] RM-6991 at 1.

[24] RM-6995 at 15.

[25] RM-6994 at 1.

[26] RM-6989 at 1.

[27] RM-6995 at 18.

[28] RM-6993 at 1.

[29] RM-6987 at 2.

[30] RM-6986 at 1.

[31] RM-6985 at 1 and 2.

[32] RM-6984 at 1.

[33] RM-6990 at 4.

[34] RM-6990 at 20.

[35] RM-6992 at 2 and 3.

[36] RM-6992 at 3.

[37] RM-6985 at 2.

[38] RM-6990 at 21, and RM-6986 at 2.

[39] RM-6989 at 1.

[40] RM-6995 at 20.

[41] RM-6987 at 2.

[42] RM-6994 at 1.

[43] RM-6993 at 1.

[44] RM-6995 at 17 and 18.

[45] RM-6986 at 2.

[46] RM-6986 at 1.

[47] RM-6989 at 1.

[48] RM-6990 at 20.

[49] RM-6994 at 1.

[50] RM-6995 at 17.

[51] RM-6995 at 19.

[52] The sixth license class designation is "Communicator."

[53] A written examination must be designed to demonstrate that the examinee has the operational and technical qualifications required to perform properly the duties of an amateur service licensee in accordance with the privileges authorized by the class of operator license sought. *See* 47 U.S.C. § 303(l)(1) and 47 C.F.R. § 97.503(b).

[54] Section 97.523, 47 C.F.R. § 97.523, requires all VECs to cooperate in maintaining one question pool for each written examination element. Each pool must contain at least 10 times the number of questions required for a single examination.

[55] The current Technician Class question pool consists of 250 questions. There are currently 300 questions in the Novice Class question pool. An additional 50 questions would be added, giving the proposed Communicator Class question pool a total of 600 questions.

[56] *See* Section 97.1(c), 47 C.F.R. § 97.1(c).

[57] Until a revised FCC FORM 610 becomes available, the administering VEs would write in certain information on the current form in the case of an application for a Communicator Operator license. We would furnish information to the VECs for temporary use of the current form, if we decide to proceed with the Communicator Class license.

[58] The computer-aided application processing system selects a new call sign from four basic groupings for assignment to an amateur station. Each call sign is sequentially selected from an alphabetized regional-group list that corresponds to the licensee's class of operator license and mailing address.

[59] RM-6995 at 19.

[60] RM-6995 at 14.

[61] *See* Radio Regulations, Nos. 2735, and 2736.

[62] The additional privileges include RTTY and data emissions and phone emissions J3E and R3E in a segment of the 10 meter band, and all authorized emissions in the 2 and 6 meter bands. *See* §§ 97.301 and 97.303.

[63] A Certificate of Successful Completion of Examination is now issued by VEs. *See* Section 97.511(e), 47 C.F.R. § 97.511(e).

[64] Section 97.119(e) requires that an indicator must be included after the call sign whenever the control operator is using privileges based on holding a CSCE. The indicator AC is proposed for the Communicator Class.

[65] Currently, Section 97.505(a)(2), 47 C.F.R. § 97.505(a)(2), requires VEs to give credit to an examinee holding a certificate of successful examination (CSCE) indicating the examination was passed within the previous 365 days. Currently, Section 97.9(b), 47 C.F.R. § 97.9(b), authorizes a licensee holding a CSCE indicating that he or she completed the necessary examinations within the previous 365 days to exercise the rights and privileges of the higher operator class. The time limitation that would apply to the use of a CSCE in conjunction with the Communicator Class license authorizing the rights and privileges of the Technician Class would be the duration of the license term and renewal thereof.

[66] Eighteen organizations function as VECs. They accredit VEs, coordinate examination sessions, maintain the question pools, provide instructions to VEs, review and forward completed license application forms to the Commission for processing. Some 50,000 examinations are administered annually under the VEC system.

[67] Some 18,000 to 20,000 persons qualify for a Novice Operator Class license annually. The examinations are administered by two General, Advanced, or Amateur Extra Operator Class licensees selected by the examinee.

[68] Some 10,000 to 15,000 persons qualify for the Technician Operator Class license annually.

[69] Currently, VEs and VEC may only be reimbursed by examinees for expenses incurred in preparing, processing, administering or coordinating an examination for a Technician, General, Advanced, or Amateur Extra Class Operator license. *See* 47 U.S.C. § 154(f)(4)(J) and 47 C.F.R. § 97.527.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-37

In the Matter of

Amendment of Parts 13 and 80 of the Rules concerning ship radio officer qualifying service endorsements.

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1990; Released: February 15, 1990

By the Commission:

I. INTRODUCTION

1. In the *Report and Order (R & O)* in this proceeding, 3 FCC Rcd 6361 (1988), the Commission amended those sections of Part 13 (Commercial Radio Operators) and Part 80 (Stations in the Maritime Services) of the Rules, 47 C.F.R. Parts 13 and 80, that relate to the requirements for the ship radio officer qualifying service endorsement. The amendments clarified and simplified the Commission's policy regarding the criteria for the issuance of the radio officer qualifying service endorsement. The Radio Officers Union, District 3, NMEBA, AFL-CI0 ("ROU") and the American Radio Association, International Organization of Masters, Mates and Pilots, ILA, AFL-CI0, ("ARA") (hereafter referred to as ROU/ARA) have timely filed a Petition for Reconsideration of that R&O. The ROU/ARA petition was opposed by the American Institute of Merchant Shipping (AIMS). The ROU/ARA replied to AIMS opposition. This Memorandum Opinion and Order addresses these pleadings.

II. BACKGROUND

2. Part II of Title III (Radio Equipment and Radio Operators on Board Ship) of the Communications Act of 1934, as amended (Act) requires large ocean-going ships to carry certain types of radio equipment and personnel for safety purposes. Cargo ships of 300 to 1600 gross tons that do not have a radiotelegraph station on board must be equipped with a radiotelephone station, 47 U.S.C. § 351(a)(1)(B). Passenger ships irrespective of size and cargo ships of 1600 gross tons and over must be equipped with a radiotelegraph station and carry at least two radio officers, 47 U.S.C. §§ 351(a)(1)(A) and 353(a). However, Section 353(b) of the Act permits cargo ships that are equipped with a radiotelegraph auto alarm to carry a single radio officer who has at least six months previous service as a radio officer on board a ship or ships of the United States.[1]

3. Section 3(z)(1) of the Act, 47 U.S.C. § 153(z)(1), defines a radio officer as a person holding at least a first or second class radiotelegraph operator's license issued by the Commission. When such a person is employed to operate a radiotelegraph station on board a U.S. ship, a radio officer license issued by the U.S. Coast Guard is also required. In order to serve as the sole radio officer on board a cargo ship under the provisions of Section 353(b), a radio officer must have a six months service endorsement on the radiotelegraph license issued by the Commission. Under the Commission's former Rules and policies an applicant for a six months service endorsement was required to document satisfactory service by showing that such service was:

(a) as a radio officer;

(b) on board a ship or ships of the United States;

(c) with a radiotelegraph station that complied with Part II of Title III of the Act;

(d) for a combined period of at least six months (180 days, 8 hours per day totaling at least 1440 hours); and

(e) while holding both a valid FCC first or second class radiotelegraph operator's certificate and a radio officer license issued by the Coast Guard (Coast Guard U.S. Merchant Marine Officer License).

All of these prerequisites must have occurred simultaneously.

4. Because these rule requirements were unncessarily restrictive, we undertook a thorough legal, technical, operational and procedural review of the requirements for obtaining the six months service endorsement. Following the review, we issued a *Notice of Proposed Rule Making (NPRM)* proposing to relax the requirements for obtaining the six months service endorsement.[2] After studying the numerous comments concerning the proposed rule amendments, we adopted a *R & O* that amended the rules substantially as proposed. Under the new rules, applicants can include time spent as a radio officer on board radiotelephone equipped ships or U.S. government owned ships in addition to service aboard ships equipped with radiotelegraph. Second, time that a ship is in port or at anchor, which does not exceed seven days, is permitted to be credited toward the aggregate six months qualifying period. Third, applicants are permitted to hold a radio officer's license issued by the Coast Guard at the time the six months endorsement is requested, rather than being required to hold it throughout the six months qualifying period. Fourth, a ship station licensee (owner/operator), master or commanding officer is permitted to certify that the applicant performed the duties of a radio operator in a satisfactory manner during the period involved. Documentation of the applicants service, such as log entries, is no longer necessary. Finally, the new rules retained the requirement for holding a first or second class radiotelegraph operator's certificate during the entire six month qualifying period.

5. ROU/ARA filed a Petition for Reconsideration of that portion of our decision that permits service on radiotelephone equipped ships and U.S. Government owned ships to be credited as service toward the six month endorsement. The ROU/ARA base their petition on three factors. First, ROU/ARA contend that the *R & O* fails to consider all of the relevant legislative history of Section 353(b) of the Communications Act. Second, ROU/ARA state that service aboard U.S. Government

owned ships (other than Coast Guard ships) should not count toward the six months service requirement. Third, ROU/ARA argue that radio officers (applying for the six months qualifying endorsement) should receive "on-board training" from experienced radio officers.

III. DISCUSSION

6. *Legislative History*. Although ROU/ARA concede that the statutory language and legislative history of Section 353(b) are ambiguous, they reiterate in their petition the arguments made in their comments in the NPRM, *i.e.*, the qualifying six months service must have been in a radiotelegraph station rather than a radiotelephone station. *See* ROU/ARA Petition at 3. In this regard, ROU/ARA contend that an important aspect of the statutory language is the use of the term "radio officer." A radio officer is defined in the Communications Act as a person holding at least a first or second class radiotelegraph operator's license. *See* 47 U.S.C. § 153(z)(1). Requiring service as a radio officer, ROU/ARA argues, indicates that the service should be on board radiotelegraph equipped ships. *See* ROU/ARA Petition at 4. As we noted in the R&O in this proceeding, however, the Act itself only generally indicates what experience is required. The intent of the Act's six months service requirement is to ensure that otherwise qualified radio officers are familiar with shipboard operations. The question is not whether the radio officers are proficient in radiotelegraphy, they are. They have passed a very difficult and comprehensieve first or second class radiotelegraph operator's test before an FCC examiner and typically have many years of communications-related experience. The six months service is a demonstration of their abilities to perform competently on board vessels at sea, for long periods of time. *See R & O* 3 FCC Rcd at 6362-63.

7. Specifically, Section 353(b) of the Act states that a single radio officer on board a cargo ship shall have had at least six months' previous service in the aggregate as a *radio officer* in a *station* on board a ship or ships of the United States. (emphasis added). Throughout Section 353 Congress often carefully inserted the word "radiotelegraph" as appropriate. It was excluded when describing the six months service requirements. This supports our interpretation as to the intent of Congress and our conclusion that service in a radiotelephone station meets the requirements of the Act. Moreover, as we explained in the *R & O*, this interpretation is reasonable in light of Congress's intent. *See* 3 FCC Rcd at 6362.

8. ROU/ARA also argue that the Act, read in light of the Safety Convention, requires that the qualifying service be performed in a radiotelegraph station. In particular ROU/ARA note that Congress amended the Act in 1965 to conform it to the Safety Convention. Thus, because the Safety Convention's definition of a of a radio officer specifically provides that a radio officer is an individual "who is employed in the radiotelegraph station of a ship", they argue that the Act should also be interpreted as including this requirement. While we agree with ROU/ARA that these two laws should be read *in pari materia*, we do not believe that our interpretation of the term "radio officer" as used in the Act contravenes this rule of statutory construction. Because the Act uses the term "radio officer" in conjunction with several requirements that appear in the Act but not in the Safety Convention, that term has a much broader purpose in the Act than in the Safety Convention. In this instance not only are we interpreting a requirement that arises only in the Act -- the six month service endorsement -- but one which predates the Safety Convention's definition of "radio officer" by several decades. Under such circumstances, we believe that we should follow Congress's intent when it adopted the six month endorsement, as discussed above, and not assume Congress meant to change that requirement, *sub silentio*, when it incorporated the 1962 Safety Convention into the Act. Certainly, nothing in the language of the statute or the 1962 Safety Convention explicitly requires that the six month service requirement be fulfilled in a radiotelepgraph station of a ship. Had Congress intended such a modification, we believe that Congress could have readily indicated its intent by changing the word "station" in Section 353(b) to read "radiotelegraph station." Yet, despite ample opportunity to do so, Congress never made such a change. Accordingly, we conclude that neither the Safety Convention nor Congress's 1965 amendments to the Act in response to that Convention require us to interpret Section 353(b) other than as we have.

9. ROU/ARA further cite No. 3952 of the international Radio Regulations (RR) as requiring service in a radiotelegraph station. [3] RR No. 3952 speaks not to "cargo ships", as the ROU/ARA contends, but to "ships of the second or third category." RR No. 4054 defines stations of the second category as stations which maintain a service of 16 hours a day. RR No. 4055 defines ships of the third category as stations which maintain a service for 8 hours a day. The service referred to in RR Nos. 4054 and 4055, however, is public correspondence service related to the conduct of ships business. The Radio Regulations requirement for class and minimum number of operators for stations on board ships are not the same as, nor congruent with, the *safety watch* requirement of Regulation 6(c)(i) of Part B of Chapter IV of the Safety Convention which requires an eight hour watch by cargo ships equipped with an auto alarm. Additionally, the term chief operator as used in RR No. 3952 is not synonymous with sole operator even for purposes of the Radio Regulations, *cf.* RR Nos. 3951 and 3953. Futhermore, U.S. cargo ships typically operate radio stations of the fourth category which maintain public correspondence service for less than eight hours per day. *See* RR No. 4056. The sole operator of a ship station of the fourth category is only required to have "adequate experience as an operator on board a ship at sea. *See* RR No. 3951.

10. *Service on board U. S. Government ships*. ROU/ARA contend that service on board U.S. Government ships should not be credited toward the six months service requirement of the Act. In support of this convention, the ROU/ARA appended a "declaration" by Harry A. Brooks, Jr. which purported to explain "the differences in training of personnel aboard Navy ships and those aboard U.S. Merchant ships." ROU/ARA and Mr. Brooks maintain that the differences in equipment and training of radio operators aboard Navy and U.S. Merchant ships are sufficiently disparate that such personnel should not be allowed to maintain the safety watch required by the Act. In this regard, ROU/ARA and Mr. Brooks maintain that such personnel are unfamiliar with commercial radio procedures, traffic accounting and working commercial shore stations. *See* Petition at 8-9. For these reasons, ROU/ARA

and Mr. Brooks maintain that such communicators do not have training that is applicable to commercial service to serve adequately as sole radio officers. *See* Petition at 9.

11. As noted above, the requirements of the Act, the Safety Convention and the Radio Regulations do not require these capabilities. The requirement is that the radio officer be able to maintain the safety watch. In the R&O we interpreted Section 353(b)'s six months service requirement as a means of assuring that, before an individual is given sole responsibility of operating a radiotelegraph station, the individual can generally physically function at sea. Service as a radio operator on a U.S. Government ship for six months while possessing an FCC first or second class radiotelegraph operator's certificate was found to meet the goals of maintaining safety standards and demonstrating seamanship.[4] To the extent that ship owners and operators desire to employ radio officers experienced in commercial radio procedures, they may do so. Many other ship owners and operator may not need radio officers with such previous commercial experience. Accordingly, we are not persuaded that the experience obtained on U.S. Government-owned ships is insufficient to fulfill the six months service requirement of the Act. Individuals with six months communications experience on U.S. Government ships clearly have demonstrated the ability to function at sea and fulfill the safety duties of a merchant ship radio officer.

12. *Training by experienced radio officers.* Lastly, ROU/ARA argue that regardless of whether the original intent of the six months service requirement was general experience or technical training, the Commission should consider today's maritime environment in which radio officers operate and maintain all of the sophisticated electronic communications and navigation equipment aboard ships. *See* Petition at 6. ROU/ARA describe in detail the sophisticated training available from the ROU's Maritime Electronics Training School. ROU/ARA point out that this comprehensive training, although fundamental to ensure that radio officers are able to perform all of the on-board tasks expected of them, is not currently required under the Commission's radio officer licensing standards. ROU/ARA urge that the licensing standards be upgraded and that, in the meantime, radio officers should receive on-board experience maintaining equipment and on-the-job training from other licensed radio officers who received comprehensive electronics training. In its opposition, AIMS points out that the on-board tasks of the radio officer are currently the subject of labor negotiations and are not a proper subject of this proceeding. *See* Opposition at 5.

13. ROU/ARA's argument that all radio officers should receive on-the-job training from experienced radio officers during the six months qualifying service period until the licensing standards can be upgraded is clearly beyond the scope of this proceeding and the current requirements of the Act, the Safety Convention and the rules. Many ship owners and operators may, in their business judgment require the sophisticated capabilities of ROU's training school graduates in order to ensure the efficient operation of their vessels. Such training, however, is not necessary to satisfy the safety watch requirements of the Act. It is not currently a condition for obtaining the Commission's first-or second-class radiotelegraph certificate or the Coast Guard's Radio Officer license nor was it proposed to be such in this proceeding. Accordingly, there is no basis for adopting such a requirement in this proceeding.

IV. ORDERING CLAUSES

14. For the reasons set forth above, we conclude and find that the modifications to the requirements for obtaining the six months qualifying service endorsement should be affirmed as adopted in the Report and Order in this proceeding.

15. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), the Petition for Reconsideration filed by ROU/ARA IS DENIED.

16. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 353(b), 47 U.S.C. § 353(b) provides: "A cargo ship which in accordance with this part is equipped with a radiotelegraph station, which is equipped with a radiotelegraph auto alarm, shall, for safety purposes, carry at least one radio officer who shall have had at least *six months' previous service in the aggregate* as a radio officer in a station on board a ship or ships of the United States." (Emphasis added.)

[2] *See* Notice of Proposed Rule Making, General Docket No. 88-37, 3 FCC Rcd 732, 733-34 (1988).

[3] RR No. 3952 provides: "Before becoming *Chief operator* of a ship station of the second or third category (*See* Nos. 4054 and 4055) the holder of a . . . first - or second class of radiotelegraph operator's certificate shall have had, as operator on board ship or in a coast station, at least six months experience of which at least three months shall have been on board ship." (Emphasis added.) We assume for the sake of argument, that this means experience as a radiotelegraph operator, although as is the case with the definition of Radio Officer in the Communications Act, this is not at all clear nor necessarily the only reasonable interpretation.

[4] R&O, *supra*, at 6363.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the Authorized
Rate of Return for the
Interstate Services of
Local Exchange Carriers

ORDER

Adopted: February 8, 1990; Released: February 12, 1990

By The Chief, Common Carrier Bureau:

1. On December 29, 1989, the Commission released an Order establishing the pleading cycle for a rate of return proceeding under Part 65 of the Commission's Rules and directed the Chief, Common Carrier Bureau, to request such additional information as would be needed to create a full record in that proceeding.[1] On January 5, 1990, the Common Carrier Bureau released an Order requiring carriers subject to the mandatory filing requirements of §65.201 of the Commission's Rules to submit additional data.[2] In this Order we modify in part and clarify the requirements of the *Supplemental Submission*.

Attachment A

2. The stock price to be used in the classic DCF formula is specified in the *Supplemental Submission* as the average of the daily highs and lows for the quarter. [3] We revise the specification to require the average of the monthly highs and lows for the quarterly estimates for the years 1980 through 1988 and the average of the daily highs and lows for the monthly estimates from January 1989 to the present.

3. The long term growth rate to be used in the classic DCF formula is specified in the *Supplement Submission* as the average of the monthly Institutional Brokers Estimate System (IBES) median long term growth rate for the quarter.[4] We revise the specification to require the IBES median long term growth rate for the last month of each quarter for the years 1980 through 1988 and each month from January 1989 to the present.

4. The expected dividend in the classic DCF formula is based upon the current annual dividend, grown by one-half the long term growth rate. The current annual dividend is specified in the *Supplemental Submission* as the most recent dividend annualized.[5] We revise the specification to require the use of the indicated annual dividend, as reported by Standard and Poor's Compustat Service (S&P), for the cost of equity capital estimates required in Exhibits A and B, and for item # 7 in Exhibit B.[6]

5. One of the qualifying criteria for a company's classic DCF cost of equity capital estimate to be included in the *Supplemental Submission*'s S&P 400 group is that the estimate exceed the 10-year US Treasury Bond rate.[7] We clarify this criterion as follows: for the quarterly estimate for the period 1980 through 1988, the average 10-year US Treasury bond rate for the last month of each quarter will be used.

6. We clarify that companies with cost of equity capital estimates not satisfying the criteria specified in Exhibit A, ¶ 5 of the *Supplemental Submission*, are excluded from Exhibit A, but not from Exhibit B.

7. We clarify the *Supplemental Submission*'s definition of the group of large electric utilities as follows:[8] To be included in the group of large electric utilities, the company must have been in 1989 classified in the U.S. Department of Commerce's Standard Industrial Classification codes 4911 and 4931 and have been listed in the S&P Primary, Supplementary, or Tertiary Industrial files.

Attachment B

8. We are making the following revisions to Tables 4, 5, and 9 of the *Supplemental Submission*: the title of the last column of Table 4 is revised to read: "Access Lines Fully Equipped for ISDN." Tables 5 and 9 are replaced by the attached Tables 5a, 5b, and 9.

9. Accordingly, IT IS ORDERED that the data and studies specified in the *Supplemental Submission* ARE AMENDED as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

Attachment B

Table 5A
TOTAL SHEATH MILES
(LOOP PLUS INTEROFFICE)

	Total	Copper	Fiber
1980			
1981			
1982			
1983			
1984			
1985			
1986			
1987			
1988			
1989			
1990			
1991			
1992			
1993			
1994			

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Attachment B

Table 5B
TRANSMISSION FACILITIES - INTEROFFICE

WORKING

	Circuits			Carrier Links (Spans)				
				----Analog----		----------Digital----------		
	Baseband	Analog CXR	Digital CXR	Copper	Radio	Copper	Radio	Fiber
1980								
1981								
1982								
1983								
1984								
1985								
1986								
1987								
1988								
1989								
1990								
1991								
1992								
1993								
1994								

Notes: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown. Digital carrier links are to be reported in DS1 equivalents.

Attachment B

Table 9
ADDITIONS AND BOOK COSTS

Gross Additions per Access Line Gain,
Gross Additions Categorization, and Average Net Book Costs

	Access Lines	Change in Access Lines	Total Gross Additions	Gross Additions per Access Line Gained	Total Gross Additions for: Modern-ization	Growth	Replace-ment	Average Net Book Cost
1980								
1981								
1982								
1983								
1984								
1985								
1986								
1987								
1988								
1989								
1990								
1991								
1992								
1993								
1994								

Note: Except for Average Net Book Cost, year-end figures are to be shown. Average Net Book Cost shall include the annual average of the following: Plant-in-service plus plant under construction, plus material and supplies, less depreciation reserve, less deferred tax reserve.

FOOTNOTES

[1] Refinement of Procedures for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, Order, CC Docket Nos. 87-463 and 89-624, FCC No. 89-362 (released December 29, 1989).

[2] Respescribing the Authorized Rate of Return for Interstate Services for Interstate Service of Local Carriers, (hereinafter *Supplemental Submission)*, CC Docket 89-624, DA 90-5, (released January 5, 1990).

[3] *Supplemental Submission*, Attachment A, Exhibit A, ¶ 2; Exhibit B, data specification # 5.

[4] *Supplemental Submission*, Attachment A, Exhibit A, ¶ 2; and Exhibit B, data specifications # 8-9.

[5] *Supplemental Submission*, Attachment A, Exhibit B, data specifications # 6, 7, and 10.

[6] S&P defines the indicated annual dividend as the intended annual dividend based on the last quarterly dividend, as determined by the ex-dividend date. Any consistent extra or special year-end dividend is included in the calculation. Standard & Poor's Compustat II (August 13, 1982), §9, 47.

[7] *Supplemental Submission*, Attachment A, Exhibit A, ¶ 5.

[8] *Supplemental Submission*, Attachment A, Exhibit A, ¶ 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHASE MANHATTAN BANK,
Complainant,

v. File No. IC-87-02652

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted February 9, 1990; Released: February 15, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed by Chase Manhattan Bank (Chase) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding.

2. Chase and AT&T represent that they have resolved all claims alleged in the proceeding in a manner acceptable to both parties. They state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

3. On the basis of the statements contained in the parties motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the joint motion to dismiss filed by Chase Manhattan Bank and American Telephone and Telegraph Company IS GRANTED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GE AMERICAN COMMUNICATIONS, INC. File No. CSG-89-166-P/L

Application for authority to construct and operate an international 6/4 GHz transmit/receive earth station at South Mountain, California, for provision of international television service with associated audio.

ORDER AND AUTHORIZATION

Adopted: February 9, 1990; Released: February 15, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 11, 1989, by GE American Communications, Inc. (GE Americom) requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at South Mountain, California, for the provision of international television service with associated audio. The application was placed on public notice on September 27, 1989. No comments were received. GE Americom has been granted blanket authority to establish and operate channels of communications between the U.S. and various international points for the provision of international television service.[1]

2. The proposed earth station will consist of a 21-meter antenna which shall meet INTELSAT Revised Standard A technical parameters and communicate with an appropriate INTELSAT satellite in the Pacific Ocean Region (POR) operating in the transmitting frequency band 5925-6425 MHz and the receiving frequency band 3700-4200 MHz. The maximum effective isotropic radiated power (EIRP) density shall not exceed 47.8 dBW/4kHz for the transmitting frequency band 6175-6365 MHz and shall not exceed 60.8 dBW/4kHz for the remainder of the transmitting band, and all emissions shall be limited to 36M0F3F. The earth station will be constructed on customer premises at South Mountain, California, and will be used to provide international television service.

3. GE Americom's legal, financial and technical qualifications to construct and operate the proposed earth station are established. GE Americom provides various international communications services including IBS and international television service. GE Americom has completed the necessary frequency coordination.

4. The proposed earth station is consistent with the Commission's policy on the ownership and operation of U.S. international earth stations[2] and its scope of operation will be the same as that permitted by the Commission in previous IBS/television authorizations.[3] We will limit the authorization to the provision of international television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

5. Upon consideration of the application, we find that authorization of the requested earth station facilities to provide international television service with associated audio would serve the public interest.

6. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that the application of GE Americom, File No. CSG-89-166-P/L, is GRANTED, and GE Americom is authorized to construct and operate the proposed 21-meter C-band earth station at South Mountain, California, to provide international television service with associated audio.[4] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

7. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] RCA American Communications, Inc., DA 87-1086, released August 13, 1987, File No. I-T-C-87-140.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] This authorization is not to be construed as permitting the provision of television service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 12, 1990

COMMENTS INVITED ON THE NEW ENGLAND REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the New England area (Region 19).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 19 consists of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut (except Fairfield, Litchfield, New Haven and Middlesex Counties). General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 90 - 53, New England Area - Region 19,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO Letter 15

Released: March 5, 1990

Responsible Accounting Officers:

Annual Report Form M - Interpretation of Certain Annual Report Form M Schedule Instructions

We have received several requests for clarification of some of the instructions and line items on schedules in the Annual Report Form M. Since our responses to these questions would be helpful to all carriers who file an Annual Report Form M, we believe that a general distribution of our responses would be appropriate.

This letter and the attachment are issued under Section 0.291 of the Commission's Rules. Applications for review under Section 1.115 of the Commission's Rules must be filed within 30 days from the date of public notice of this letter.

If you have any questions, contact John T. Curry or Virginia Brockington at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits
Division
Common Carrier Bureau

Annual Report Form M

Questions and Answers on Certain

Instructions and Schedules

Schedule B - 3a, Investments in Affiliated Companies

1. Q. How should those affiliates who meet the "common control" criteria described in Section 32.9000 of the Commission's Rules be reported if no equity investment is recorded in Account 1401, Investments in Affiliated Companies?

A. Affiliates who meet the "common control" criteria described in Section 32.9000 and for whom there is no investment amount recorded in Account 1401, Investment in Affiliated Companies, should be reported in separate columns on Schedule B-3b. Schedule B-3a, Investments in Affiliated Companies, is designed to disclose the carriers' investments in affiliated companies that are accounted for under the equity method (*i.e.*, the investment amount is increased or decreased because of undistributed earnings or losses). The investment amounts are recorded in separate columns for each affiliate for whom an amount is recorded in Account 1401. The carriers should also report in the appropriate columns data required for affiliate activity in Account 1160, Temporary investments; Account 1180, Telecommunications accounts receivable; Account 1190, Other accounts receivable; Account 1200, Notes receivable; and Account 1210, Interest and dividends receivable.

Schedule B - 3b, Investments in Affiliated Companies - Cost Method and Nonaffiliated Companies

2. Q. Instruction 4 requires the carriers to report in column (j), nonaffiliated companies accounted for in Account 1402. Where do they report nonaffiliates in which they have no investment?

A. Schedule B-3b is designed to disclose the investments in affiliated companies which are accounted for under the cost method and provide information on nonaffiliated companies. Respondents should report in columns (b) through (i) information on affiliated companies for whom an investment amount is recorded in Account 1401, Investment in Affiliated Companies, and accounted for under the cost method; and companies that meet the "common control" criteria for an affiliate under Section 32.9000. Information on nonaffiliates in which there is no equity ownership interest should be reported in column (j) of this schedule.

Schedule B - 5a, Analysis of Telecommunications Plant in Service Retired

3. Q. Are both lines 2 and 6 necessary?

A. No. Line 3300 is not necessary and will be deleted with the next revision of the Annual Report Form M.

Schedule B - 5c, Bases of Charges for Depreciation

4. Q. Should Instruction 10 of this schedule be reworded to say "In column (h) report the amount of reserve deficiency amortized to Account 6561"? This will clarify that any other kind of amortization should be reported in column (g).

A. No. Instruction 10 should not be reworded to limit column (h) to only amounts of reserve deficiency charged to Account 6561 during the year. There are two columns that pertain to charges to Account 6561, Depreciation expense-telecommunications plant in service - column (g), Expense Amount, and column (h), Amortization Amount. The carrier is required to report in column (g), the depreciation expense charged to Account 6561 and calculated by the method prescribed by the Commission for depreciation charges. No other charges are to be included in this column. For column (h), however, the carrier is required to report the amortization amount charged to Account 6561. These amounts in column (h) include amortizations of a reserve deficiency and the results of any other special amortization of a plant asset.

5. Q. How should the amount in column (i) be determined?

A. The average plant balance to be reported in column (i) shall equal the sum of monthly average plant balances for the year divided by twelve.

Schedule B - 10, Long - Term Debt

6. Q. Should the word "unamortized" in Instruction 8 be changed to say "original" since this is how the yield rate is calculated?

A. The term "unamortized" does not need to be changed. For the purposes of calculating the yield rate, we define the yield rate as the rate of interest which when used to discount future cash flows results in total present value equal to the net proceeds received for the debt issue. This yield rate is computed at the time the debt is issued, and at the time of issuance, the terms "original" and "unamortized" are the same.

Schedule I - 2, Special Expenses Attributable to Formal Regulatory Cases

7. Q. Is the reporting threshold of this schedule $100,000 as stated in Instruction 4 or should the threshold remain at the $10,000 limit as discussed in paragraph 99 in the Order?

A. The reporting threshold of this schedule is $10,000.

Schedule I-4, Pension Cost

8. Q. How should a carrier report its management and nonmanagement pension plans?

A. The carriers shall identify and report each major pension plan on a separate page.

Schedule I-8, Special Charges

9. Q. Should items under Caption 3 (construction projects) and Caption 4 (penalties and fines) that are less than $100,000 be reported?

A. Yes, items that are less than $100,000 and come under Caption 3 or Caption 4 should be reported on the line entitled "Aggregate of All Other Items."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Annual Report Form M

ORDER

Adopted: February 12, 1990; Released: February 12, 1990

By the Chief, Common Carrier Bureau:

1. By *Memorandum Opinion and Order* in this proceeding, 4 FCC Rcd 4879 (Com. Car. Bur. 1989), the Common Carrier Bureau revised Federal Communications Commission Annual Report Form M (Form M). An *Errata* was issued on July 27, 1989, to correct minor errors and omissions.[1] In the course of preparing the revised Form M for printing, we noted additional typographical and format errors. We have also reviewed the form to detect minor editorial changes that would assist preparers in completing the various Form M schedules. These minor modifications to the Form M schedules are described in Attachment A.

2. We conclude that all instructions should be consolidated into a separate booklet rather than placed on individual schedules. This format will produce schedules that are easier to read and use. In addition, we are including in the booklet a check list for the statistical schedules to assist preparers and to reduce the possibility of errors. This check list was developed after discussing potential problems in completing the Form M with industry representatives, and in light of errors that we detected in the 1988 Form M. The changes to the financial and statistical schedule instructions and the check list are shown in Attachment B.

3. The attached revisions to the Form M schedules and instructions are adopted pursuant to Section 0.291(b)(4) of the Commission's Rules. Because these changes are minor in nature, in most cases correcting report format errors or interpreting existing instructions, compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. Section 553(B).

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the FCC Annual Report Form M Schedules and related instructions ARE REVISED, as set forth in the Appendices hereto.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Revision of Annual Report Form M, 4 FCC Rcd 5749 (Com. Car. Bur. 1989).

ATTACHMENT A

The corrections and editorial changes to FCC Form M schedules appear below in appropriate categories.

Clarification of Required Information

Schedule B-4

Uncollectible Accounts (Accounts 1181, 1191 and 1201)

Parenthetical phrase "(Explain in a Note)" is added to Line 4.

Line 14 is changed to Line 15 and Line 14 reads: "Amount included on Line 2 Attributable to Affiliate Receivables."

B-5b

Analysis of Entries in Accumulated Depreciation (Account 3100)

Page 2 is changed to page 3 and page 3 is changed to page 2.

S-1

Outside Plant Statistics

Column heading for Column (bb), which is redesignated as Column (y) for the 1989 Report.* should read "Miles of Telephone Channel (Equivalent 4KHz & 64Kb/s)."

A footnote is added at the bottom of the schedule to read "'Wires' include coaxial tubes and nonmetallic physical transmission paths."

Renumbering Lines and / or Relocating Dollar Signs

Schedule B-3a

Investments in Affiliated Companies

Dollar signs immediately below column headings are moved to Line 1.

* *See* Relettering of Columns for Schedule S-1 in this Attachment.

B-3b

Investments in Affiliated Companies - Cost Method and Nonaffiliated Companies

Dollar signs immediately below column headings are moved to Line 1.

B-3c

Assets Purchased From or Sold to Affiliates

Dollar signs in columns (c) through (g) are moved to Line 1. Line 15 is moved to Section I and Line 15 in Section II is relabeled Line 16.

B-5a

Analysis of Telecommunications Plant in Service Retired

Line 13 is moved below the line entitled "Other Accounts (Specified)." Line 20 is eliminated and Line 18 is identified as the line for the total of columns (b) and (c). The last line on the printed schedule reads: "Full explanation of amounts reported on Lines 13 through 17."

B-5b

Analysis of Entries in Accumulated Depreciation (Account 3100)

On page 2 of 4, Lines 1 through 16 are renumbered as Lines 26 through 41. A total line labeled Line 42 is established. On Page 4 of 4, Lines 1 through 16 are renumbered as Lines 26 through 41. A total line labeled Line 42 is established.

B-8

Deferred Charges (Account 1439)

In column (a) the words "Account 1439" are moved above Line 1.

B-9

Accounts Payable (Account 4010)

Dollar signs immediately below column headings are moved to Line 1.

B-11

Net Deferred Operating Income Taxes (Accounts 4100 and 4340)

Dollar signs immediately below column headings are moved to Line 1.

Dollar signs from line immediately preceding Line 8 are moved to Line 8.

B-12

Net Deferred Nonoperating Income Taxes (Accounts 4110 and 4340)

Dollar signs immediately below column headings are moved to Line 1.

Dollar signs are added to Line 12.

I-5c

Excise Taxes Collected From Users of Respondent's Services

Line 29 is deleted.

I-6

Advertising

Line 29 is deleted.

I-7

Membership Fees and Dues

In the Section entitled "Expenditures Charged to Operating Expenses" Line 7 becomes the line for the total.

I-8

Special Charges (Account 7370)

The line entitled "Aggregate of all Other Items" is labeled Line 28 and Line 29 is identified as the Total Line.

I-10

Analysis of Dividend and Interest Income

Dollar signs immediately below column headings are moved to Line 1 and dollar signs are added to columns on Line 15.

S-6

Overseas Telephone and Related Services

Dollar signs are added to column (c) on Lines 1, 13, 14, 20, and 21.

Modifying Appropriate Columns for a Percent Sign

Schedule B-5c Bases of Charges for Depreciation

Percent signs are added to columns (d), (e), and (f) on Line 1.

Placing the Word " Total " on the Appropriate Line

Schedule I-5b

Prepaid Taxes and Tax Accruals (Accounts 1300, 4070 and 4080)

Line 33 should read "Total."

***Relettering of* Columns**

Schedule S-1

Outside Plant Statistics

The letter designations for the "Line No." columns are deleted where they appear in the top and bottom sections of pages 1 and 2. The "State or Territory" columns are relettered as column (a) where they appear in the top and bottom sections of pages 1 and 2. In the top section of page 1 columns (c) through (k) are relettered (b) through (j). In the top section of page 2, columns (l) through (q) are relettered (k) through (p) and are moved to the bottom section of page 1. In the bottom section of page 1, columns (t) through (bb) are relettered (q) through (y) and are moved to the top section of page 2. In the bottom section of page 2, columns (cc) through (ee) are relettered (z) through (bb).

ATTACHMENT B

The corrections and editorial changes to FCC Form M financial and statistical schedule instructions appear below.

General Instructions

A sentence is added to paragraph (a) to read "The data are used by staff members in the regulation of the telephone industry and by the public in analyzing the industry. Your response is mandatory."

Specific Instructions for All Schedules

The first two instructions for each General Corporate Information Schedule (A), each Balance Sheet Account Schedule (B), Income Statement Account Schedule (I) and Statistical Schedule (S) are deleted. For each sched-

ule, instruction number 3 is renumbered as instruction 1 and all succeeding instructions are renumbered in numerical order.

Schedule B-4

Uncollectible Accounts

A new instruction is added to read "5. Show on Line 14 the portion of the accrual reported on Line 2 that is attributable to affiliate receivables."

I-2

Special Expenses Attributable to Formal Regulatory Cases

In renumbered Instruction 2 change $100,000 to $10,000.

I-9

Donations or Payments for Services Rendered by Persons Other Than Employees

Renumbered Instruction 3 reads in its entirety as follows: "Report all charitable donations in the aggregate and payments to academia, individually. Also report in alphabetical order the recipient and the amount paid for advertising and information services, clerical and office services, computer and data processing services, personnel services, printing and design services, and security services when payments to the recipient exceeds $250,000 during the calendar year. Report in alphabetical order, the recipient and the amount paid for auditing and accounting services, consulting and research services, financial services, legal services and any other type of service when payments to the recipient exceeds $25,000 during the calendar year."

S - Statistical Schedules

General Instructions - Definitions

A paragraph is added to the beginning of the instructions to read "All carriers should review the following general notes which clarify or extend the instructions for the FCC Form M. Footnotes should be used liberally, especially where you perceive any ambiguities in data provided or where prior procedures or internal sources associated with data preparation have changed."

Definitions for Schedule S-1 Outside Plant Statistics

A new item is added to read "32. Fiber may be termed 'equipped' or 'lit' when the first circuit is turned up on a fiber system."

A new item is added to read "33. If any entry would be a fraction of a mile, show the exact amount or show an entry less than 1 mile as 1."

Definitions for Schedule S-2 Access Lines in Service by Technology

Items 33 through 39 are renumbered as Items 34 through 40.

A new item is added to read "41. Include DS-1's and other access lines associated with switched services only. DS-1's associated with nonswitched services should be multiplied by 24 and included in Schedule S-3."

A new item is added to read "42. Include WATS and 'WATS like' access lines, as well as 800 and § 800 like' access lines, but do *NOT* include official/company circuits in the access line counts. Provide a footnote if you have done this differently in the past."

A new item is added to read "43. To be classified as Digital, the access line must be terminated at the customer end as a digital line or be available for use by the customer."

A new item is added to read "44. Do not include circuits which provide access to an interexchange carrier in this schedule."

Definitions for Schedule S-3 Access Lines in Service by Customer

Item 40 is renumbered as Item 45.

Item 41 is renumbered 46 and reads "Single Line - A single business network access line which serves one party (i.e. 1MB) and is billed at the single line subscriber line rate."

Item 42 through 45 are renumbered as 47 through 50.

Item 46 is renumbered 51 and reads "Special Access Lines (non-switched) -Total special access lines connecting an end user's premises to an interexchange carrier point of presence. This category does not include local private lines provided by the local carrier which originate and terminate within the same LATA."

Items 47 and 48 are renumbered as 52 and 53.

Definitions for Schedule S-4 - Telephone Calls

A new item is added to read "54. All call counts (and billed minutes) should reflect completed calls. Where completed call data is unavailable, you may estimate the number of completed calls but indicate your methodology and source data in a footnote."

Specific Instructions for Statistical Schedules

Schedule S-1

Outside Plant Statistics

Renumbered instruction 5 (*See* Specific Instruction for All Schedules) reads "5. For columns (q) and (t) provide only the number of fiber miles 'lit' or equipped with electronics, and the number of tube miles of coaxial equipped with electronics. Usually, a fiber or coaxial tube is considered equipped when it is capable of handling the first active circuit. Do not provide total sheath mileage."

Renumbered instruction 6 reads "6. For column (r) provide the total fiber miles in the ground, not just the amount equipped with carrier equipment or in service."

Renumbered instruction 7 reads "7. In columns (w), (x), and (y) report the aggregate number of miles of system or channels, as appropriate, between the individual stations or radio-relay systems. In column (y) include 64kb/sec digital circuit miles in the total, where applicable."

A new instruction 10 is added to read "10. Miles of fiber and miles of coaxial tube should be included along with wire mileage even though the heading for columns d, f, h, j, l, n, and p state 'wire'."

Schedule

S-2 Access Lines in Service By Technology

Renumbered Instruction 2 reads "2. In column (b) provide for each state or territory the total number of Central Office Switches. If more than one switch is housed in a single building or structure, be sure to count each switch separately. Do not separately count each three digit telephone number prefix as a separate switch. Column (b) should include the number of remote switches but a footnote should be used to show the number of remote switches included in the total, where applicable."

A new instruction 10 is added to read "10. Any individual 64 Kb/sec circuits to a PBX or Centrex not sold as part of an entire DS-1 should be noted in a footnote and added to column f. If you do not know that a DS-1 associated with switched services connects to a customer PBX or Centrex, still include these in column f but provide their quantity in a footnote."

A new instruction 11 is added to read "11. Column i (other) should include digital Centrex extensions. Quantities for any item included in column i should be separately noted in a footnote."

A new instruction 12 is added to read "12. This schedule should not include any special access lines. All special access lines should be included in Schedule 3 column g."

Schedule

S-3 Access Lines in Service By Customer

A new instruction 4 is added to read "4. Column (g) should include equivalent 64Kb/sec, 4khz, or DS-1's weighted as in Schedule S-2. For example, the number of DS-1's should be multiplied by 24 before including in the total. Only include DS-1 if the customer has access to the entire DS-1. Include in a footnote, the number of digital special access lines terminating at a customer location."

A new instruction 5 is added to read "5. Columns b through f on Schedule S-3 should equal the total of columns c through i on Schedule S-2 and DS-1's should be multiplied by 24 before inclusion."

Schedule

S-4 Telephone Calls

Renumbered instruction 5 should read "5. Include any intralata-interstate and intralata-intrastate toll calls in column (c)."

Checklist for Schedules S - 1 through S - 4

Before submitting your Form M, make the following consistency checks:

1. (Schedule S-2): If there are more than 15,000 access lines per switch, please check the number of switches (column b) and access lines (columns c through i). There may be too few switches indicated or too many access lines.

2. (Schedule S-2): If the ratio of column d to column f is less than 1 or more than 25, please check the validity of data entered in columns d and f.

3. The total of columns c through i in Schedule S-2 should match column h minus column g in Schedule S-3. Total access lines should be the same no matter how categorized. In some cases a footnote may be required to explain discrepancies. Also, please make sure that special access lines are not included in Schedule S-2.

4. (Schedule S-2): The number of switches listed in column b generally should not be zero.

5. (Schedule S-2): If there are fewer than 1,000 access lines per switch, please check the number of switches (column b) and access lines (columns c through i). There may be too many switches indicated, too few access lines, or missing data.

6. (Schedule S-4): If you have not included any interstate calls for column d, note that column d should include all completed interlata toll interstate calls *originated in your jurisdiction*. Please review your submission to make sure you have provided all required data.

7. (Schedule S-4): If you have not included any intrastate calls for column f, note that column f should include all completed interlata toll intrastate calls originated in your jurisdiction. Please review your submission to make sure you have provided all required data.

8. (Schedule S-4): If the number of billed interstate call minutes (column e) divided by the number of interstate calls (column d) results in an average call length of more than 12 minutes, please check columns d and e. Zero or missing data could be causing this.

9. (Schedule S-4): If the number of billed intrastate call minutes (column g) divided by the number of intrastate calls (column f) results in an average call length of more than 12 minutes, please check columns g and f. Zero or missing data could be causing this.

10. (Schedule S-4): If the number of billed interstate call minutes (column e) divided by the number of interstate calls (column d) results in an average call length of less than 3 minutes, please check columns d and e. Zero or missing data could be causing this. Make sure you have provided all applicable data.

11. (Schedule S-4): If the number of billed intrastate call minutes (column g) divided by the number of intrastate calls (column f) results in an average call length of less than 3 minutes, please check columns g and f. Zero or missing data could be causing this. Make sure you have provided all applicable data.

12. (Schedule S-1): If you have not included or indicated as zero a figure for the number of fiber miles of fiber which are lit or equipped with carrier equipment in column q, please note that this data is now required.

13. (Schedule S-1): If you have not included a figure for the total number of fiber miles of fiber (lit and dark) deployed and you have fiber in your facility base, please be sure that this data is provided.

14. (Schedule S-1): Please be sure that the number of fiber miles of lit fiber (column q) is less than the total number of fiber miles (column r).

15. (Schedule S-1): Please check the number of miles of wire (column p) and the miles of cable (column o) and be sure you have provided all required data. Also be sure you have provided wire miles in column o and not sheath miles.

16. (Schedule S-1): If columns z and aa (carrier channel miles) are zero or blank, be sure all applicable data have been provided.

17. (Schedule S-2): If your entries in columns c, d, and f are less than .5% of the entries in columns c through i, please verify that the amount of digital access in your facility base is this small. Please provide any missing data where applicable.

18. (Schedule S-1): The number of equivalent 4Khz channel miles (column y) should be greater than the number of miles of radio channel (column x), and the

number of radio channel miles (column x) should be greater than the number of radio system miles (column w). Any nonzero entry in column x should be matched with a nonzero entry in column y and vice versa. Please be sure that all required data is provided in columns w, x, and y.

19. (Schedule S-1): Miles of wire - Be sure that column p equals the total of columns d, f, h, j, l, and n.

20. (Schedule S-1): Miles of cable - Be sure that column o equals the total of columns c, e, g, i, k, and m.

21. (Schedule S-1): Be sure that each nonzero entry in columns d, f, h, j, l, or n is paired with a nonzero entry in columns c, e, g, i, k, or m respectively, or vice versa. Any nonzero value less than 1 should *not* be represented as zero but may be listed as 1.

22. If you provide nondigital access to main telephones, please check to make sure that there is a nonzero entry in Schedule S-2 column e.

23. Column h in Schedule S-3 (Total Access Lines) divided by column g in Schedule S-3 (Special Access Lines) should typically be less than 100. If you provide special access and your ratio exceeds 100, further follow-up may be necessary.

24. (Schedule S-1): If column (aa) is more than 100 million or less than 1 million, please recheck the number and be sure that the number of DS-1 miles is appropriately weighted by 24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-102

In the Matter of

Amendment of Section 73.202(b),	RM-6636
Table of Allotments,	RM-6887
FM Broadcast Stations.	
(Burnham and Altoona, Pennsylvania)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. At the request of DB Communications (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 3937 (1989), proposing the allotment of Channel 262A to Burnham, Pennsylvania, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Music Broadcasting, Inc. ("Music Broadcasting"), licensee of Station WPRR(FM), Altoona, Pennsylvania, filed a counterproposal requesting the substitution of Channel 261B1 for Channel 261A at Altoona and the modification of its license accordingly.[2] In addition, Music Radio proposes the allotment of Channel 244A to Burnham in lieu of Channel 262A. No other comments were received.

2. We believe the public interest would be served by adopting the counterproposal advanced by Music Radio since it furthers the efficient use of the FM spectrum. Implementation of the counterproposal will permit Burnham to receive its first local service while also permitting Station WPRR(FM) at Altoona to expand its coverage area.

3. Channel 244A can be allotted to Burnham in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.7 kilometers (6.6 miles) southwest to avoid a short-spacing to Station WPGM-FM, Channel 244A, Danville, Pennsylvania, and Station WHP-FM, Channel 247B, Harrisburg, Pennsylvania. Channel 261B1 can be allotted to Altoona, Pennsylvania, with a site restriction of 10.4 kilometers (6.5 miles) northwest to avoid a short-spacing to Station WXMJ, Channel 258A, Mount Union, Pennsylvania. Station WFRE-FM, Channel 260B, Frederick, Maryland, and Station WJJB, Channel 261A, Romney, West Virginia.[3] Canadian concurrence in these allotments has been received since Burnham and Altoona are both located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Altoona, Pennsylvania	251B, 261B1
Burnham, Pennsylvania	244A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Music Broadcasting, Inc. for Station WPRR(FM), Altoona, Pennsylvania, IS MODIFIED to specify operation on Channel 261B1, in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. The window period for filing applications for Channel 244A at Burnham, Pennsylvania, will open on **April 3, 1990,** and close on **May 3, 1990.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Altoona, Pennsylvania, has been added to the caption.

[2] Public Notice of the filing of the counterproosal was given on July 17, 1989, Report No. 1786.

[3] The coordinates for Channel 261B1 at Altoona are North Latitude 40-35-01 and West Longitude 78-28-45. The coordinates for Channel 244A at Burnham are North Latitude 40-33-40 and West Longitude 77-39-23. Because the petitions which resulted in these allotments were filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-302

In the Matter of

Amendment of Section 73.202(b), RM-6664
Table of Allotments,
FM Broadcast Stations.
(Beaver Springs, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. At the request of Susan A. Bernstein (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5373 (1989), proposing the allotment of Channel 291A to Beaver Springs, Pennsylvania, as its first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allotted.

2. The *Notice* asked the petitioner to furnish additional information to demonstrate that Beaver Springs is a community for allotment purposes since it is not listed in the 1980 U.S. Census. In response, petitioner states that Beaver Springs is located within Spring Township. She states that the community has its own post office with separate zip code, police and fire department, sewage treatment plant, ambulance service, industrial and retail outlets, several churches and civic organizations. According to the Officer-in-Charge of the Beaver Springs Post Office and the Spring Township Supervisors, Beaver Springs has a current population of 619 persons.

3. Based on the above information, we believe that Beaver Springs is a community for allotment purposes. Further, we find that the public interest would be served by allotting Channel 291A to Beaver Springs, since it could provide the community with its first local FM service. Channel 291A can be allotted to Beaver Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.2 kilometers (3.2 miles) south to avoid a short-spacing to Stations WZKZ, Channel 291B, Corning, New York, and WHLM, Channel 293B, Bloomsburg, Pennsylvania.[1] Canadian concurrence in the allotment has been received since Beaver Springs is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Beaver Springs, Pennsylvania	291A

5. The window period for filing applications will open on **April 3, 1990,** and close on **May 3, 1990.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-42-04 and West Longitude 77-13-34. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-25

In the Matter of

Amendment of Section 73.202(b),	RM-6570
Table of Allotments,	RM-6587
FM Broadcast Stations.	RM-6646
(Algona, Forest City and Osage, Iowa)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1623 (1989), seeking comments on three mutually exclusive petitions for rule making. Osage Broadcasting Company ("OBC") requested the substitution of Channel 224C2 for Channel 224A at Osage, Iowa, and the modification of its license for Station KCZY to specify the higher powered channel. In addition, OBC requested the substitution of Channel 297A for Channel 224A at Algona, Iowa, and the modification of KLGA, Incorporated's ("KLGA") license for Station KLGA to specify the alternate Class A channel. KLGA requested that its Algona station be upgraded from Channel 224A to Channel 224C2 and that the license of OBC's Station KCZY be modified to specify operation on Channel 225A in lieu of its present Channel 224A. Pilot Knob Broadcasting ("Pilot Knob"), licensee of Station KIOW, Forest City, Iowa, requested the substitution of Channel 297C2 for Channel 272A at Forest City, Iowa, and the modification of its license to specify the non-adjacent higher powered channel. OBC, KLGA and Pilot Knob filed comments.

2. The *Notice* proposed to either upgrade OBC's station at Osage with the concomitant modification of KLGA's license to specify the alternate Class A channel (Option I) or to upgrade both KLGA and Pilot Knob's stations at Algona and Forest City with a modification of OBC's license to specify the alternate Class A channel (Option II). All of the parties support Option II. OBC, in its comments, however, requests that its license for Station KCZY be modified to specify operation on Channel 279A. In support, it states that Channel 225A at Osage would conflict with the outstanding construction permit of Station KATR, Dubuque, Iowa. In view of OBC's consent to the modification of its license to specify the alternate Class A frequency, there is no need to comparatively consider the proposals before us.

3. We believe the public interest would be served by substituting Channel 224C2 for Channel 224A at Algona, Iowa, Channel 297C2 for Channel 272A at Forest City, Iowa, and Channel 279A for Channel 224A at Osage, Iowa, since it could permit Stations KLGA and KIOW, respectively, to expand their coverage areas. OBC has consented to the modification of its license for Station KCZY to specify operation on Channel 279A. In accordance with Commission policy, KLGA has expressed its intention to reimburse OBC for the reasonable costs associated with Station KCZY's channel change. Further, as proposed, we will modify the licenses of Stations KLGA and KIOW to specify operation on Channel 224C2 and Channel 297C2, respectively. The modification of Station KIOW's license to specify a non-adjacent higher powered channel is in accord with Section 1.420 of the Commission's Rules since no other party expressed an interest in use of the channel at Forest City.

4. Channel 224C2 can be allotted to Algona, Channel 279A to Osage and Channel 297C2 to Forest City, Iowa, in compliance with the Commission's minimum distance separation rules and can be used at the present transmitter sites of Stations KLGA, KCZY and KIOW, respectively.[1]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Algona, Iowa	224C2
Forest City, Iowa	297C2
Osage, Iowa	279A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of KLGA, Incorporated, for Station KLGA, Channel 224A, Algona, Iowa, and Pilot Knob Broadcasting, for Station KIOW, Channel 272A, Forest City, Iowa, ARE MODIFIED to specify operation on Channels 224C2 and 297C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KCZY, Channel 224A, Osage, Iowa, IS MODIFIED to specify operation on Channel 279A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KCZY's license, BLH-800718AB, except the channel as specified

above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-800718AB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 279A at Osage are North Latitude 43-19-20 and West Longitude 92-51-22. The coordinates for Channel 224C2 at Algona are 43-04-05 and 94-12-08. The coordinates for Channel 297C2 at Forest City are North Latitude 43-04-35 and 93-35-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-303

In the Matter of

Amendment of Section 73.606(b), RM-6661
Table of Allotments,
Television Broadcast Stations.
(Arcade, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. At the request of Robert Bennett (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5375 (1989), proposing the allotment of UHF TV Channel 62- to Arcade, New York, as the community's first local television service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 62- can be allotted to Arcade in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.2 kilometers (9.5 miles) east to avoid a short-spacing to the construction permit for Channel 48+ at Corning, New York, and to unused Channel 55 at Niagara Falls, Ontario, Canada.[1] Canadian concurrence in the allotment has been received since Arcade is located within 400 kilometers (250 miles) of the U.S.-Canadian border. This allotment is not affected by the Commission's freeze on new television allotments since it is not located within the minimum co-channel distance to any of the markets affected by the freeze. *See Order*, 52 FR 28346, July 29, 1987.

3. We believe the public interest would be served by allotting Channel 62- to Arcade, New York, since it could provide the community with its first local television service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Arcade, New York	62-

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-28-44 and West Longitude 78-15-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-100

In the Matter of

Amendment of Section 73.202(b),	RM-6647
Table of Allotments,	
FM Broadcast Stations.	
(Sargent, Nebraska)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. At the request of E. Eugene McCoy, Jr. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 3933 (1989), proposing the allotment of Channel 221C1 to Sargent, Nebraska, as its first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Petitioner was requested to furnish additional data to demonstrate that Sargent is a community for allotment purposes since it is not listed in the 1980 U.S. Census. In response, petitioner states that Sargent is incorporated and according to the Nebraska Department of Economic Development has a 1980 population of 828 persons. In addition, petitioner states that Sargent has a Chamber of Commerce, an active business community, an 18 bed hospital, a weekly newspaper, numerous religious institutions, a bank and its own local elementary through high school system. Petitioner submits that a Sargent station on Channel 221C1 could provide service to a large area of rural Nebraska that currently is underserved.

3. Based on the information provided, we believe that Sargent is a community for allotment purposes. Channel 221C1 can be allotted to Sargent in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sargent, Nebraska	221C1

4. The window period for filing applications will open on **April 3, 1990,** and close on **May 3, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-38-30 and West Longitude 99-22-18. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR Section 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-50

In the Matter of

Amendment of Section 73.202(b), RM-6615
Table of Allotments,
FM Broadcast Stations.
(Walhalla, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: February 16, 1990

By the Chief, Allocations Branch:

1. At the request of Appalachian Broadcasting Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2191 (1989), proposing the allotment of Channel 242A to Walhalla, South Carolina, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received. Channel 242A can be allotted to Walhalla in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (7.0 miles) northeast to avoid a short-spacing to Stations WEOA, Channel 241C, Atlanta, Georgia, and WRXR-FM, Channel 242C2, Aiken, South Carolina.[1]

2. We believe the public interest would be served by allotting Channel 242A to Walhalla, South Carolina, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Walhalla, South Carolina	242A

3. The window period for filing applications will open on **April 3, 1990,** and close on **May 3, 1990.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-51-11 and West Longitude 83-00-17. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR Section 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-47

In re Applications of

ROBERT B. MAHAFFEY (hereafter Mahaffey) File No. BPH-870123MD

OZARK ENTERTAINMENT NETWORK (hereafter Ozark) File No. BPH-870127MH

MELVIN B. CALDWELL (hereafter Caldwell) File No. BPH-870127MJ

DOROTHY S. LEMMON (hereafter Lemmon) File No. BPH-870127ML

Construction Permit for a
New FM Station on Channel 225A
in Ozark, Missouri

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Cedric Randle, general partner of Ozark, is an employee (he does not state in what capacity) of Station KWTO(FM), Springfield, Missouri. Due to the proximity of Station KWTO(FM) to Ozark, Mr. Randle's interest in both statons could violate the Commission's cross-interest policy. However, Mr. Randle has indicated his intent to terminate his employment with KWTO(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Ozark's application, Mr. Randle will be required to sever all connections with station KWTO(FM) prior to the commencement of program test authority.

3. Section II, Item 9 of FCC Form 301 asks whether there are any documents, instruments, contracts or understandings relating to the applicant's ownership or future ownership rights (including, but not limited to, non-voting stock interests, beneficial stock ownership interests, options, warrants, debentures). A positive response requires specification of the particulars in an exhibit. Ozark indicated "Yes" to Section II, Item 9, but provided no specifics, indicating only that there exists a general partnership agreement. Ozark will therefore be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, detailing the ownership rights created by its general partnership agreement.

4. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Caldwell has filed such statement, it is deficient. Caldwell has not listed a specific women's organization or a specific minority organization as recruitment sources. Further, it has failed to identify any educational institutions to be contacted for recruitment purposes, and it has also failed to identify specific publications which will be utilized to attract women and minority candidates. Accordingly, Caldwell will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after April 5, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
Caldwell	March 7, 1988
Lemmon	December 12, 1988; July 14, 1989

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of Ozark's application, Cedric Randle shall divest himself of all interests in and sever all connections with station KWTO(FM), Springfield, Missouri prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Ozark shall file an amendment containing the information specified in Section II, Item 9 of FCC Form 301 with the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Caldwell shall submit Section VI information in accordance with the requirements of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Caldwell and Lemmon ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-359

In the Matter of

Amendment of Section 73.202(b)	RM-5369
Table of Allotments,	RM-5587
FM Broadcast Stations	RM-5664
(Churubusco, Huntington, Roanoke	RM-5665
and South Whitley, Indiana)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 1, 1990; Released: February 20, 1990

By the Commission:

1. The Commission has before it an application for review filed by Huntington Broadcasting Corporation ("HBC"), licensee of Station WOWO-FM (formerly WIOE-FM), Channel 276A, Huntington, Indiana, directed against the *Memorandum Opinion and Order* (" *M O& O")* in this proceeding, 4 FCC Rcd 5045 (Pol. and Rules Div. 1989). The *MO & O* denied HBC's petition for reconsideration and request for stay of the *Report and Order ("R&O")*, 2 FCC Rcd 6505 (Pol. and Rules Div. 1987), which allotted Channel 242A to Churubusco, Indiana, substituted Channel 275A for Channel 276A at Huntington and modified HBC's license for Channel 276A accordingly, and allotted Channels 266A and 286A to South Whitley, Indiana, and Roanoke, Indiana, respectively. Premier Broadcasting Company, Inc. ("Premier"), an applicant for Channel 242A at Churubusco, filed an opposition to HBC's application for review. Midwest Communications Company ("MCC"), licensee of Station WQTZ-FM, Decatur, Indiana, filed an untimely opposition and a motion for leave to file its opposition.[1] For the reasons discussed below, we will deny HBC's application for review.

BACKGROUND

2. This proceeding began when the Policy and Rules Division released a *Notice of Proposed Rule Making* [2] *("Notice")* proposing the allotment of Channel 274A to Churubusco, Indiana. Prior to the release of the *Notice*, but after the Commission received the petition requesting the Churubusco allotment, HBC filed a petition to substitute Channel 275A for Channel 276A at Huntington and to modify its license for Station WOWO-FM accordingly. HBC stated that it requested the substitution in order to eliminate short-spacing between Channel 276A at Huntington and Channel 276A at South Bend, Indiana. Because HBC's proposal was mutually exclusive with the Churubusco proposal, the Policy and Rules Division treated HBC's petition as a counterproposal to this proceeding. During the comment period following release of the *Notice*, HBC submitted comments suggesting that Channel 266A or 286A be allotted to Churubusco instead of Channel 274A, and the Churubusco proponent submitted comments suggesting that Channel 278A, and not Channel 276A, be allotted to Huntington. Two parties submitted timely counterproposals proposing the allotment of Channel 266A to South Whitley, Indiana, and Channel 286A to Roanoke, Indiana. The South Whitley and Roanoke proposals were mutually exclusive with the substitute channels proposed by HBC for Churubusco, and the staff announced acceptance of the South Whitley and Roanoke proposals as counterproposals to this proceeding in a public notice. During the reply comment period following release of the public notice, HBC filed comments suggesting the allotment of Channel 242A to Roanoke, Channel 266A to South Whitley, Channel 274A to Churubusco, and Channel 286A to Huntington.

3. Prior to the initial comment deadline in this proceeding, Erwin Draper ("Draper") separately filed a petition proposing the allotment of Channel 242A to Ligonier, Indiana. This proposal was not treated as a counterproposal because it was not mutually exclusive with any of the channels proposed in initial comments to this proceeding. However, it did conflict with that portion of HBC's pleadings suggesting the allotment of Channel 242A to Roanoke. On October 9, 1987, the Policy and Rules Division released a *Notice of Proposed Rule Making* (Ligonier, Indiana) ("Ligonier *Notice* "), 2 FCC Rcd 6096 (1987) proposing the allotment of Channel 274A, and not Channel 242A, to Ligonier due to the conflict between the Ligonier proposal and HBC's suggestion of Channel 242A at Roanoke.

4. The *R & O* in this proceeding, released on October 22, 1987, resolved a number of conflicting requests for allotments to Indiana. Among other actions, it allotted Channel 242A to Churubusco rather than to Roanoke. The *R & O* stated, "Channel 242A had been requested in a separate proposal . . . for Ligonier, Indiana. However, alternative channel 274A has been proposed for that community." *Id.* at note 5. The *R & O* also substituted Channel 275A for Channel 276A at Huntington, as HBC had requested in its initial petition.

5. HBC filed a petition for reconsideration of the *R&O*. HBC noted that it suggested in reply comments the allotment of Channel 274A to Churubusco, Channel 242A to Roanoke, Channel 266A to South Whitley, and Channel 286A to Huntington, and the modification of the license of Station WOWO-FM to specify operation on Channel 286A. However, HBC claimed in its petition for reconsideration that it also requested in its comments prior to the *R & O* the allotment of Channel 278A to Huntington as a local FM station in addition to HBC's present FM station. [3] HBC claimed the Division rejected this allotment scheme to accommodate the Ligonier proposal. HBC argued that the staff acted improperly by effectively treating the Ligonier proposal as a counterproposal to this proceeding without notifying any of the parties that it was doing so, thereby denying HBC of its right to notice and comment in a rule making proceeding. HBC also claimed that Channel 286A, and not Channel 275A, should have been allotted to Huntington instead of Roanoke because Huntington is "the more important community under Section 307(b) precedent [and] is entitled to the channel it prefers, a channel capable of being upgraded to improve service to Huntington."[4] HBC claimed that, had it known of the Ligonier proposal, it would have proposed allot-

ments of Channel 278A to Churubusco, Channel 266A to South Whitley, Channel 242A to Roanoke, Channel 274A to Ligonier, and Channel 286A and/or Channel 275A to Huntington, and the modification of the license of Station WOWO-FM to specify operation on Channel 286A.

6. The Division denied HBC's petition for reconsideration, stating that a comparative examination of the community needs of Roanoke and Huntington was unnecessary because both communities could receive a channel of the class requested. The Division determined that HBC was untimely in discussing its desire for a potentially upgradable station for the first time in its petition for reconsideration, stating that a petitioner must raise potential upgrade concerns before the close of the initial comment date in a proceeding. The Division also determined that the substitution of channels to achieve the allotment plan approved in the *R & O* was proper because each community received a Class A channel as requested, even if not the particular channel sought.

APPLICATION FOR REVIEW

7. HBC claims that review of the *MO & O* is warranted because the action conflicts with Commission and court precedent, and contains both erroneous findings as to material facts and prejudicial procedural error. In an apparent abandonment of its allotment proposal providing for an allotment to Ligonier as set forth in its petition for reconsideration, HBC now states that it supports what it refers to as its earlier proposal to allot Channel 274A to Churubusco, Channel 242A to Roanoke, Channel 266A to South Whitley, and Channels 278A and 286A to Huntington,[5] and the modification of the license of Station WOWO-FM to specify operation on Channel 286A. HBC claims that if Ligonier is allotted Channel 274A as it suggested in its petition for reconsideration, then its channel plan cannot be adopted without depriving Roanoke of an allotment. HBC argues that the Commission did not notify the public of the existence of the Ligonier rule making proposal until approximately eight months after the final pleadings had been filed in response to the *Notice* in this proceeding. HBC claims the Division's action deprived HBC of an opportunity to comment on the Ligonier proposal's relationship with this proceeding, and that this constitutes prejudicial procedural error. HBC argues this action is "very similar to the action ruled impermissible" in *Memorandum Opinion and Order* (Ponte Vedra Beach, Florida) (" *Ponte Vedra Beach* "), 4 FCC Rcd 843 (Pol. and Rules Div. 1989), *recon. granted on other grounds*, 4 FCC Rcd 5369 (Pol. and Rules Div. 1989), and that the Division's failure to mention the case in the *MO & O* constitutes reversible error. HBC claims that application of the *Ponte Vedra Beach* decision to this proceeding would require the issuance of a *Further Notice of Proposed Rule Making* proposing a Ligonier allotment.

8. HBC also argues that the Division erred in failing to consider the implications of the "quiet village doctrine" in its decision.[6] HBC claims the Division erroneously characterized HBC's petition for reconsideration as a challenge to the community status of Roanoke. Instead, HBC argues, it asserted that Huntington is entitled to a second channel before the much smaller community of Roanoke receives a first allotment, and, alternatively, that Huntington should be entitled to the preferred channel requested by HBC if both communities receive allotments. HBC, citing to *Reeder v. FCC*, 865 F.2d 1298, 1305-06 (D.C. Cir. 1989), claims the Division should have applied the quiet village doctrine used in comparative hearing proceedings in this case. HBC claims that, in its petition for reconsideration of the *R & O*, it cited to Commission cases such as *Ruarch Associates*, 101 FCC 2d 1358 (1985), *Santee - Cooper Broadcasting Co. of Hilton Head, Inc.*, 99 FCC 781 (Rev. Bd. 1984), *modified on other grounds sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), and *FM Channel Assignments* (North Charleston, South Carolina, *et al.*), 51 RR 2d 25 (MM Bur. 1982), in support of the proposition that the Commission has never found that a community with a population of less than 1000 warrants preferential treatment compared to a larger community in multiple-party proceedings. HBC claims that these cases "dictate the result that a second channel in Huntington is to be preferred over a first channel in Roanoke."

9. Finally, HBC argues that the Division's reliance in its *MO & O* on the fact that a new Class A channel was allotted to Huntington is reflective of an outmoded Commission policy that should be changed. HBC argues that petitioners should be entitled to express an interest in a particular Class A frequency and have their interest evaluated against competing interests for that frequency. HBC claims that Class A channels are not fungible commodities, because one Class A channel "may have far greater opportunity for improvement than another." HBC argues that if its preference for Channel 286A is evaluated against the interests of allotting that channel to the smaller community of Roanoke, that the channel should be allotted to Huntington.

10. In its opposition, Premier claims that it would incur additional time, expense, and delay in amending its application to specify a new transmitter site if Channel 274A is allotted to Churubusco instead of Channel 242A. Premier argues that HBC presents no basis for why Channel 286A should be allotted to Huntington instead of Channel 275A. Premier, citing to *Memorandum Opinion and Order* (Vero Beach, Florida), 4 FCC Rcd 2184 (1989), claims that unless relevant factors which might undermine the equivalence of two channels of the same class are timely raised before the Bureau, it is neither feasible nor appropriate for the Commission to assess such concerns. Premier argues that because HBC never sought an upgrade, it cannot now claim that the Commission thwarted its upgrade attempts. Finally, Premier argues that HBC failed to protect its interest in the allotment of Channel 286A through timely intervention in the related MM Docket No. 88-284 proceeding.[7]

DISCUSSION

11. After careful consideration of the pleadings in this case, we will deny HBC's application for review and affirm the *Memorandum Opinion and Order* in this proceeding.

12. The Commission's policy is to presume that channels of the same class are equivalent for allotment purposes.[8] We do not differentiate between available channels on the basis that one channel may offer a licensee the potential for a future class upgrade whereas another channel may not. This policy ensures the most efficient use of the spectrum. Otherwise, we might reserve spectrum space for a potential future use that may never arise.[9]

13. We will, however, consider relevant factors which might rebut the presumption of channel equivalency if those factors are timely raised.[10] It is incumbent upon a petitioner to raise potential class upgrade concerns before the deadline for initial comments in an allotment proceeding. Consideration of such concerns submitted after that date would effectively constitute an unjustified waiver of the Commission's rules in that it would amount to consideration of an untimely counterproposal. In this case, we note that HBC never requested a channel upgrade, stating for the first time in its petition for reconsideration that it wanted a channel *capable* of being upgraded.[11] Because HBC failed to timely request a channel upgrade, the Division acted properly in substituting Class A channels to accommodate all requests.

14. The *R & O* and *MO & O* did not present a comparative analysis of the Roanoke and Huntington proposals because by substituting channels, the Division accommodated all the timely expressed interests in this proceeding.[12] When channels are available to satisfy each timely filed expression of interest in a proceeding, there is no need to address whether one community would prevail over another under the quiet village doctrine. *See generally New South Broadcasting v. FCC*, 879 F.2d 867 (D.C. Cir. 1989). Accordingly, the quiet village doctrine and the cases cited by HBC are not applicable in this situation.

15. Finally, we find that the Division's treatment of the Ligonier proposal was proper. As the *MO & O* stated, the Ligonier proposal conflicted with none of the timely filed proposals or counterproposals in this proceeding, and was therefore treated in a separate proceeding as required by the Commission's rules.[13] The only conflict between this proceeding and the Ligonier proceeding arose when HBC, in reply comments to the timely filed counterproposals for South Whitley and Roanoke, suggested the allotment of a conflicting channel to Roanoke as a means of accommodating all interests in this proceeding. Purusant to Commission policy, the Division undertook an engineering analysis to determine if equivalent channels were available to accommodate all interests. The Division properly determined that by allotting substitute channels, all timely interests, including HBC's, could be accommodated.[14] As a result, it was unnecessary for the Division to issue a *Further Notice of Proposed Rule Making* seeking comment on the merits of allotting a channel to Ligonier as opposed to any of the other communities in this proceeding. Indeed, the Division was able to allot for HBC's use precisely the channel proposed in its original petition.

16. Accordingly, IT IS ORDERED, That the application for review filed by Huntington Broadcasting Corporation IS DENIED.

17. IT IS ALSO ORDERED, That the motion for leave to file an opposition filed by Midwest Communications Company IS DENIED.

18. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] MCC, a party to MM Docket No. 88-284 (Angola *et al.*, Indiana, and Brooklyn and Hudson, Michigan), opposes HBC's suggestion that the Commission should stay consideration of that proceeding pending action on its application for review. MCC claims that it would be adversely affected by a stay. MCC requests leave to file its opposition, claiming that HBC did not serve MCC with a copy of its application for review and that the Commission did not place HBC's application for review on public notice. We will deny MCC's motion for leave to file its opposition. HBC was not required to serve MCC with a copy of its application for review because MCC is not a party to this proceeding. Furthermore, the Commission is not required to place applications for review on public notice. MCC could have learned of HBC's application for review by checking the docket file for this proceeding in the Mass Media Bureau's public reference room. Accordingly, MCC has not presented sufficient grounds for the untimely filing of its opposition, and therefore we will not consider MCC's opposition in this proceeding.

[2] 51 Fed. Reg. 33645 (1986). Comments were due by November 6, 1986, and reply comments by November 21, 1986.

[3] An examination of HBC's pleadings in response to the *Notice* reveals that HBC proposed the allotment of Channel 278A as a second local FM station to Huntington for the first time in its petition for reconsideration. No party to this proceeding has expressed an interest in applying for a second local FM service at Huntington.

[4] *MO & O*, 4 FCC Rcd at 5046.

[5] *See* note 3, *supra*. HBC never suggested the allotment of Channel 278A to Huntington in any of its pleadings prior to the *R & O*.

[6] The quiet village doctrine states that, under certain circumstances, a decisive Section 307(b) preference will not be given to an exceedingly small community proposing first local service in a comparative proceeding. *See, e.g., Beacon Broadcasting*, 2 FCC Rcd 3469, 3471-72 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987), *aff'd., New South Broadcasting v. FCC*, 879 F.2d 867 (D.C. Cir. 1989).

[7] A *Notice of Proposed Rule Making* (Angola and Lagrange, Indiana; and Brooklyn, Michigan), 3 FCC Rcd 4031 (1988) proposed the allotment of Channel 287B1 to Angola, Indiana. A timely filed counterproposal to that proceeding proposed the allotment of Channel 287B1 to Decatur, Indiana. Both proposals are mutually exclusive with HBC's proposal to allot Channel 286A to Huntington.

[8] *See, e.g.*, Paragraph 3(c) of the standard Appendix to notices of proposed rule making for allotment proceedings, including this proceeding, in which we state that the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved in the proceeding.

[9] In BC Docket No. 80-130, we eliminated our policy of examining the preclusive effects of an allotment on the potential for future channel allotments in nearby communities. We noted that a preclusion analysis could result in the denial of service to a community in which interest for an allotment was expressed in order to protect the mere possibility that an expression of interest for an allotment in the precluded community may be raised at some future date. We stated that "[w]here interest [in a community] is shown through the filing of a counterproposal, it will be given careful attention and accorded the full weight it deserves." *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 95 (1982). Therefore, the Commission now tests the preclusive effect of proposed allotments on upgrades by

considering all timely filed upgrade requests. There was no request for an upgrade at Huntington filed by the comment deadline in this proceeding.

[10] *See Memorandum Opinion and Order* (Vero Beach, Florida), 4 FCC Rcd 2184 (1989).

[11] Because the Commission's rules provide for both adjacent and nonadjacent channel substitutions, any Class A channel is potentially upgradable. *See* Commission rule 1.420(g), 47 CFR 1.420(g). Therefore, HBC remains free to seek an upgrade if it can be accomplished in compliance with our rules and policies.

[12] Although the Division apparently did not consider HBC's proposal in its petition for reconsideration to allot two channels to Huntington, this omission was not of decisional significance. HBC's proposal to allot two channels to Huntington, advanced for the first time in its petition for reconsideration, was untimely. *See* 47 CFR 1.420(d). However, even if HBC had timely proposed the allotment of two channels to Huntington, consideration of that proposal would not have served the public interest because no party expressed an interest in applying for the second Huntington channel.

[13] Paragraph 3(b) of the standard Appendix to notices of proposed rule making for allotment proceedings, including this proceeding, states that petitions for rule making filed during the period for submitting initial comments that are in conflict with the proposals in the *Notice* will be treated as comments.

[14] *Ponte Vedra Beach* is distinguishable from the instant proceeding. In *Ponte Vedra Beach*, consideration of a substitute channel for a proposed rule making petition precluded adoption of a timely filed counterproposal. Here, consideration of a substitute channel to accommodate the Ligonier proposal did not preclude adoption of any timely proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-231

In the Matter of

Amendment of Section 73.202(b),	RM-6706
Table of Allotments,	RM-6406
FM Broadcast Stations.	RM-5381
(Shreveport, Bastrop, Homer, Ruston,	RM-5094
Vivian, and Jonesboro, Louisiana,	RM-5604
El Dorado and Stamps, Arkansas,	
Atlanta, Henderson, and	
San Augustine, Texas)	

FURTHER NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: February 1, 1990; Released: February 20, 1990

By the Commission: Commissioner Marshall not participating.

1. This document is issued as a result of the decision of the U.S. Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), which, *inter alia*, remanded to the Commission for further consideration a proposal by James A. Reeder ("Reeder"), licensee of Station KMJJ-FM (formerly KCOZ), Shreveport, Louisiana.[1] This proposal requested the substitution of Channel 259C1 in lieu of Channel 261A at Shreveport, and modification of the Station KMJJ-FM license to specify operation on Channel 259C1. In accordance with that remand, we are issuing this *Further Notice of Proposed Rule Making* to consider the timely filed counterproposal by Reeder in response to the original *Notice of Proposed Rule Making* in this proceeding, 40 Fed. Reg. 11214, published March 26, 1984. In the event that we cannot accommodate the original counterproposal filed by Reeder, we will also consider subsequent proposals filed by Reeder in an effort to effectuate a channel upgrade at Station KMJJ-FM. Inasmuch as we may find that in order to upgrade Station KMJJ-FM, it would serve the public interest to modify existing licenses, we are including *Orders To Show Cause* directed to the licensee of Station KTOC-FM, Jonesboro, Louisiana, and Station KGRI-FM, Henderson, Texas. We will provide the background and an analysis of the proposals below.[2] We note that Proposal 6, which necessitates these license modifications, will accommodate the parties presently in this proceeding.

BACKGROUND

2. In BC Docket No. 80-90, *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983), *recon. denied* 97 FCC 2d 279 (1984), we created three additional classes of FM channels, Class B1, Class C1 and Class C2. We determined that a large scale rule making proceeding was necessary in order to respond to requests for new FM allotments and expedite service to the public. The resulting *Notice of Proposed Rule Making* in this proceeding listed 684 proposed FM allotments. The *Notice* set forth special rules governing the consideration of counterproposals in this "omnibus" proceeding. Specifically, to be considered, a counterproposal was required to be mutually exclusive with a proposed channel allotment *and* to fit into one of five categories: (1) first or second aural service; (2) first local service; (3) first fulltime local service; (4) minority service; [3] or (5) public radio service. *See* 49 Fed. Reg. at 11216.

PROPOSAL 1

3. In response to the *Notice*, Reeder submitted a timely counterproposal proposing the Channel 259C1 upgrade at Shreveport. This upgrade conflicted with the proposed Channel 260A allotment at Homer, Louisiana, and the proposed Channel 260A allotment at San Augustine, Texas. To avoid these conflicts, Reeder proposed the use of either Channel 278A or 283A in lieu of Channel 260A at Homer, and Channel 281A in lieu of Channel 260A at San Augustine.[4] The *First Report and Order* allotted Channel 260A to Homer, Channel 260A to San Augustine and conflicting Channel 258A to Ruston, Louisiana (instead of Channel 239A originally proposed in the *Notice*). The Reeder counterproposal was returned because the Shreveport upgrade did not meet any of the five announced acceptance categories.

PROPOSAL 2 AND PROPOSAL 3

4. On February 25, 1985, Reeder filed a petition for reconsideration of the *First Report and Order*. In his petition for reconsideration, Reeder renewed his request for that portion of Proposal 1 that requested the Channel 259C1 upgrade at Shreveport. To effectuate this upgrade, Reeder proposed four changes in channels allotted in the *First Report and Order*. Specifically, Reeder renewed his request for the substitution of Channel 283A in lieu of Channel 260A at Homer, Louisiana, and suggested substitution of Channel 223A in lieu of Channel 260A at San Augustine, Texas. Reeder requested the substitution of Channel 239A in lieu of Channel 258A at Ruston, Louisiana, and Channel 258A in lieu of Channel 239A at Vivian, Louisiana. In addition, Reeder submitted an alternative proposal for a Channel 259C2 upgrade at Shreveport which would only have required a channel substitution at Homer and Ruston (Proposal 3).[5]

5. In a *Memorandum Opinion and Order*, 59 RR 2d 679 (1985), the Commission denied the Reeder petition for reconsideration on the basis that the Reeder counterproposal had not met any of the five categories set forth in the original *Notice*. In that action, the Commission also stated that it would not substitute omnibus allotments in the absence of a "compelling need or Commission error." That *Memorandum Opinion and Order* went on to state that an upgrade in channel did not constitute a compelling need. Reeder sought judicial review of this action as well as the earlier *First Report and Order*.

PROPOSAL 4 AND PROPOSAL 5

6. In a subsequent and separately filed petition for rule making, Reeder modified parts of his earlier proposals. Reeder proposed the Channel 259C1 upgrade at Shreveport, along with four substitutions of channels allotted in MM Docket No. 84-231. Specifically, Reeder requested the substitution of Channel 239A in lieu of Channel 260A at Homer (Proposal 2 had requested a Channel 283A substitution), Channel 231A in lieu of Channel 258A at Ruston (Proposal 2 had requested a Channel 239A substitution), Channel 238A in lieu of Channel 239A at Vivian, Louisiana, and Channel 223A in lieu of Channel 260A at San Augustine, Texas. Reeder also renewed its earlier request (Proposal 3) for a Channel 259C2 upgrade at Shreveport, a change which only required channel changes at Vivian and Homer. In doing so, the Court did not address the underlying merits of the upgrade proposal.

7. On January 24, 1989, the Court of Appeals released its decision in the *Reeder* case. In that decision, the Court determined that both the five counterproposal limitations in the *Notice* and the "no substitutions" policy set forth in the *Memorandum Opinion and Order, supra*, were adopted without the requisite notice and opportunity for public comment in contravention of the Administrative Procedure Act, 5 U.S.C. Section 553 (b), (c) (1982).[7] In view of the fact that the counterproposal limitation and the "no substitution" policies were improperly adopted, the Court could find no basis for refusing to consider the original Reeder counterproposal in the "omnibus" proceeding or Reeder's subsequent proposals merely because they required substitution of "omnibus" allotments. As a result, and the Court remanded the case to the Commission.[7] In doing so, the Court did not address the merits of the upgrade proposals.

8. In its April 11, 1989, Supplement, Reeder submits a new proposal to upgrade Channel 259C2 at Shreveport. This Supplement is also intended to facilitate the implementation of the remand by the Court. Reeder suggests, in order to accommodate the Channel 259C2 upgrade, that the Commission substitute Channel 285A in lieu of Channel 260A at Homer and Channel 223A in lieu of Channel 260A at San Augustine, Texas. In addition, Reeder notes that a Channel 285A allotment at Homer would be short-spaced to Station KTOC-FM, Channel 285A, Jonesboro, Louisiana. Therefore, Reeder proposes the substitution of Channel 238A for Channel 285A at Jonesboro, and modification of the license for Station KTOC-FM accordingly. Reeder also refers to our action in MM Docket No. 86-87, substituting Channel 259C2 in lieu of Channel 257A at Atlanta, Texas, and modifying the license of Station KPYN, Atlanta, to specify operation Channel 259C2. *See* 2 FCC Rcd. 431 (1987). That action was conditioned on the outcome of the *Reeder* appeal. Reeder suggests that a Class C2 upgrade at Atlanta may be achievable, but on a different channel. Specifically, Reeder suggests a Channel 261C2 upgrade at Atlanta, and, in order to accommodate the Atlanta upgrade, substitution of Channel 260A in lieu of Channel 261A at Henderson, Texas, and modification of the license of Station KGRI-FM, Channel 261A, Henderson, to specify operation on Channel 260A.

DISCUSSION

9. As we indicated in a separate *Memorandum Opinion and Order* in this proceeding, the manner in which Reeder's separate proposals will be considered depends, in part, on their procedural posture. We will now to consider Reeder's Proposal 1 as a timely filed counterproposal in connection with the allotments proposed and allotments ultimately adopted in the omnibus proceeding. Section 1.420(d) of the Rules requires that counterproposals be advanced by the initial comment date. Inasmuch as Proposal 1 was a timely counterproposal in the omnibus proceeding, we will not accept any further proposals conflicting with it, nor will we consider any subsequently filed rule making proposals in determining whether grant of the proposal would serve the public interest. In order to be considered with Proposal 1, such proposals should have been filed by the May 14, 1984 comment date in MM Docket 84-231. However, we will accept comments and reply comments concerning the comparative merits of the Shreveport upgrade in connection with conflicting proposals within the scope of the original *Notice* in MM Docket No. 84-231.

10. In view of the fact that the proposed allotment (Proposal 1) could provide improved FM broadcast service to Shreveport, Louisiana, we believe it is appropriate to request comment concerning amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:[8]

	Channel No.	
City	Present	Proposed
Homer, Louisiana	260A	278A or 283A
Shreveport, Louisiana	261A	259C1
San Augustine, Texas	260A	281A

The allotment of Channel 278A or 283A to Homer would be short-spaced to Station KJLO, Channel 281C, Monroe, Louisiana. A Channel 278A allotment at Homer would also be short-spaced to the Channel 279A allotment at Haughton, Louisiana made in MM Docket No. 86-323 as well as the proposed Channel 277C1 upgrade by Station KAYZ, Channel 276A, El Dorado, Arkansas in MM Docket No. 89-85. A Channel 283A allotment at Homer would be short-spaced to a Channel 283A allotment at Camden, Arkansas made in MM Docket No. 87-598. A Channel 281A allotment at San Augustine would be short-spaced to the Channel 281C2 allotment at Tyler, Texas made in the *First Report and Order* in this proceeding.[9] Normally, we would not accept a counterproposal involving short spacings to stations licensed when the counterproposal was advanced. We note, however, that the short spacings derive not from that portion of Reeder's proposal that requested the upgrade at Shreveport, but from the proposed substitution at Homer. Therefore, it appears that the upgrade at Shreveport could be adopted in compliance with the Commission's minimum distance separation requirements were we to delete without replacement the Homer allotment.[10] It is our tentative view, however, that this would not serve the public interest. Commission policy generally favors an allotment which would provide for an entirely new station over an allotment that would allow enhancements to the service provided by an existing station.

11. Although, consistent with current Commission procedures, we will not consider subsequently filed rule making proposals in evaluating the merits of Reeder's timely counterproposal, we believe it appropriate to request comments on Reeder's subsequently filed rule making petitions, and on the merits of those proposals in comparison with other subsequently filed proposals. Therefore, in the event that we are unable to accommodate a Shreveport upgrade as contemplated by the original Reeder counterproposal in this proceeding, we are requesting comment and reply comments concerning each of the subsequent proposals advanced by Reeder. We will consider counterproposals in conflict with Proposals 2 through Proposal 6. These proposals are as follows:

Proposal 2

	Channel No.	
City	Present	Proposed
Homer, Louisiana	260A	283A
Ruston, Louisiana	258A	239A
San Augustine, Texas	260A	223A
Shreveport, Louisiana	261A	259C1
Vivian, Louisiana	239A	238A

In addition to the short-spacings outlined above for Proposal 1, a Channel 238A allotments at Vivian would be short-spaced to Station KAFX-FM, Channel 238C1, Diboll, Texas, as well as a proposal to allot Channel 238A to Stamps, Arkansas (RM-6706). The Channel 238A substitution at Vivian is necessary to accomodate the substitution of Channel 239A for Channel 258A at Ruston. The Channel 258A a allotment at Ruston conflicts with the Channel 259C1 upgrade at Shreveport. As such, the Stamps allotment, is effect, conflict with the Channel 259C1 upgrade at Shreveport. Therefore, we shall also propose Channel 238A at Stamps as an alternate proposal.

Alternative Proposal 2

	Channel No.	
City	Present	Proposed
Stamps, Arkansas	---	238A

Proposal 3

	Channel No.	
City	Present	Proposed
Homer, Louisiana	260A	283A
Shreveport, Louisiana	261A	259C2

Alternative Proposal 3

	Channel No.	
City	Present	Proposed
Atlanta, Texas	257A	259C2

Proposal 4

	Channel No.	
City	Present	Proposed
Shreveport, Louisiana	261A	259C1
Homer, Louisiana	260A	239A
Ruston, Louisiana	258A	231A
Vivian, Louisiana	239A	238A
San Augustine, Texas	260A	223A

A Channel 239A allotment at Homer would be short-spaced to the Channel 239A allotment at Vivian as well as an upgrade from Channel 240A to 241C1 by Station KIXK, El Dorado, Arkansas which was granted in MM Docket No. 87-73 conditioned on the outcome of Reeder's appeal. A Channel 231A allotment at Ruston would be short-spaced to an upgrade from Channel 232A to Channel 230C2 by Station KTRY, Bastrop, Louisiana as proposed in MM Docket No. 87-242. Because the Homer, Vivian and Ruston proposed substitutions are intended to accommodate the Shreveport upgrade to Channel 259C1, this upgrade will be comparatively considered with the upgrades at El Dorado and Bastrop. We also note that the proposed allotment at Stamps is mutually exclusive with Proposal 5. Alternative Proposal 4 would grant these mutually exclusive proposals.

Alternative Proposal 4

	Channel No.	
City	Present	Proposed
Stamps, Arkansas	---	238A
El Dorado, Arkansas	240A	241C1
Bastrop, Louisiana	232A	230C2

Proposal 5

	Channel No.	
City	Present	Proposed
Shreveport, Louisiana	261A	259C2
Vivian, Louisiana	239A	238A
Homer, Louisiana	260A	239A

Proposal 6

	Channel No.	
City	Present	Proposed
Bastrop, Louisiana	232A	230C2
Shreveport, Louisiana	261A	259C2
Homer, Louisiana	260A	285A
Jonesboro, Louisiana	285A	238A
Atlanta, Texas	257A	261C2
Henderson, Texas	261A	260A
San Augustine, Texas	260A	223A

In this regard, a Channel 285A allotment at Homer would be short-spaced to Station KTOC-FM, Channel 285A, Jonesboro, Louisiana. A Channel 261C2 upgrade at Atlanta would be short-spaced to Station KGRI-FM, Channel 261A, Henderson, Texas. The Channel 260A allotment at Henderson would be short-spaced to the Channel 259C1 upgrade of Shreveport as well as the Channel 260A allotment at San Augustine. We note that the allotments set forth in Proposal 6 would accommodate all the parties presently in this proceeding.

STATION KLBQ, EL DORADO, ARKANSAS

12. As an additional matter, we are considering a petition for reconsideration filed by El Dorado Broadcasting Company (formerly Lowery Broadcasting Company) ("KLBQ"), licensee of Station KLBQ, Channel 257A, El Dorado, Arkansas, directed against the action in MM Docket No. 87-73 dismissing KLBQ's proposed upgrade from Channel 257A to Channel 258C2. 3 FCC Rcd 4840 (1988). The KLBQ counterproposal in that proceeding was dismissed pursuant to the "no substitutions" policy. Specifically, the proposed KLBQ Channel 258C2 upgrade requires the substitution of 241A for Channel 258A at Ruston, and Channel 230A for Channel 258A at Hamburg, Arkansas.[11] The Channel 241 substitution at Ruston conflicts with an upgrade from Channel 240A to Channel 241C1 at El Dorado, Arkansas. That proposed upgrade was initially proposed by Station KIXK in MM Docket 87-73. The Channel 230A substitution at Hamburg conflicts with the upgrade from Channel 232A to Channel 230C2 at Bastrop, Louisiana, proposed by Station KTRY in MM Docket 87-242. Also, KLBQ's proposed Channel 258C2 upgrade at El Dorado conflicts with both Reeder's Channel 259C1 and Reeder's Channel 259C2 proposal at Shreveport. As such, the KLBQ upgrade proposal conflicts with the proposed upgrades to Stations KIXK, El Dorado, KTRY, Bastrop, and KMJJ-FM, Shreveport. Inasmuch as the Station KLBQ upgrade proposal was dismissed pursuant to the "no substitutions" policy struck down by the Court and conflicts with allotments involved in this proceeding, we will now consider the Station KLBQ upgrade proposal in this proceeding.[12] We are doing so because KLBQ maintained its procedural rights to be considered in this proceeding by appealing the earlier dismissal. Accordingly, we also request comment concerning amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as proposed by KLBQ.

Alternative Proposal 6

	Channel No.	
City	Present	Proposed
El Dorado, Arkansas	257A	258C2
Ruston, Louisiana	258A	241A
Hamburg, Arkansas	258A	230A

In the event that its Channel 258C2 upgrade at El Dorado is denied, KLBQ requests an upgrade on Channel 254C3[13]. In light of that request and the fact that the C3 proposal could be granted consistent with each of the allotments proposed in Reeder Proposal 6, we hereby propose amending the FM Table of Allotments as set forth in Reeder's Proposal with the following addition:

	Channel No.	
City	Present	Proposed
El Dorado, Arkansas	257A	254C3

13. As indicated earlier, in order to accommodate a Shreveport upgrade, it may be necessary to modify the licenses of Station KTOC-FM, Jonesboro, Louisiana, and Station KGRI-FM, Henderson, Texas. We believe that an upgrade by Station KMJJ-FM would serve the public interest because it will provide an additional wide-area FM service to the Shreveport area. Because changing the channel of Station KTOC-FM from Channel 285A to Channel 238A, and the Channel of Station KGRI-FM from Channel 261A to Channel 260A are modifications of license within the purview of Section 316 of the Communications Act, we are issuing *Orders to Show Cause* directed to Jackson Parish Broadcasting, licensee of Station KTOC-FM, and Dean Broadcasting, Inc., licensee of Station KGRI-FM, to show cause why their respective licenses should not be modified. Including these *Orders* at this time will, if ultimately found to be in the public interest, permit us to proceed to a *Report and Order* allotting the appropriate channels necessary to effectuate the upgrade at Shreveport.

14. In regard to the proposed license modifications, revised Section 316 of the Act and Section 1.87 of the Rules requires that we inform the affected licensee/permittee of the proposed action and resulting public interest benefits.[14] In the present situation, we have stated that the public interest would be furthered by an additional wide-area FM service at Shreveport. In order to obtain a hearing, either Dean Broadcasting, Inc. or Jackson Parish Broadcasting must now establish a substantial and material question of fact concerning the proposed modifications and public interest benefit.

ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, that pursuant to Section 316(a) of the Communications Act of 1934, as amended, Jackson Parish Broadcasting, licensee of Station KTOC-FM, Channel 285A, Jonesboro, Louisiana, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 238A.

16. IT IS FURTHER ORDERED, that pursuant to Section 316(a) of the Communications Act of 1934, Dean Broadcasting, Inc., licensee of Station KGRI-FM, Channel 261A, Henderson, Texas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 260A.[15]

17. Pursuant to Section 1.87 of the Commission's Rules Jackson Parish Broadcasting and Dean Broadcasting, Inc., may, not later than **April 2, 1990,** file a written statement showing with particularity why their respective licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call upon either Jackson Parish Broadcasting or Dean Broadcasting, Inc. to furnish additional information. If either Jackson Parish Broadcasting or Dean Broadcasting, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon

review of the statements and/or additional information furnished, the Commission may grant the modification(s), deny the modification(s) or set the matter of modification(s) for hearing. If no written statement is filed by the date referred to above, Jackson Parish Broadcasting and/or Dean Broadcasting, Inc. will be deemed to have consented to the modification(s) as proposed in the respective *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

18. IT IS FURTHER ORDERED, That the aforementioned petiton for reconsideration filed by El Dorado Broadcasting Company, license of Station KLBQ, El Dorado, Arkansas, IS GRANTED to the extent indicated above.

19. IT IS FURTHER ORDERED, That a copy of this *Notice of Proposed Rule Making* be sent BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Dean Broadcasting, Inc.
Radio Station KGRI-FM
Box 1400
Henderson, Texas 75652

Jackson Parish Broadcasting
Radio Station KTOC-FM
1300 Gansville Road
Jonesboro, Louisiana 71251

Sherry Williamson Pody
310 Northwood Place
Ruston, Louisiana 71270

Vicar Communications, Inc.
P.O. Box 121
Bastrop, Louisiana 71220

Jerald H. Womack
111 Silver Drive
Monroe, Louisiana 71203

Tyler Far, Inc.
113 E. 7th Street
Tyler, Texas 75701

New South Communications, Inc.
Radio Station KJLO
P.O. Box 5797
Meridian, Mississippi 39301

Louisiana Radio Associates
P.O. Box 93
Princeton, Louisiana 71067

Cary D. Camp
949 Poleman Road
Shreveport, Louisiana
71107

Simcott Broadcasting, Inc.
3304 Lakeshore Drive
Shreveport, Louisiana
71109

20. The Commission's authority to institute rule making proceedings and to specify required, showings cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

21. Interested parties may file comments on or before **April 16, 1990,** and reply comments on or before **May 1, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the following parties to this proceeding:

KIXK, Inc.
c/o Miller & Fields
P.O. Box 33003
Washington, D.C. 20033

Jamie Patrick Broadcasting, Inc.
Radio Station KTRY-FM
Shelton Road
Bastrop, Louisiana 71220

Noalmark Broadcasting Corporation
Radio Station KAYZ
2525 North West Avenue
El Dorado, Arkansas 71730

Radio USA, Ltd.
c/o Wiley, Rien & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Ark-La-Tex Broadcasting Company
Radio Station KPYN
Box 858
Atlanta, Texas 75751

El Dorado Broadcasting Company
Radio Station KLBQ
c/o Lauren A. Colby
P.O. Box 113
Frederick, Maryland 21701

Dean Broadcasting, Inc.
Radio Station KGRI-FM
Box 1400
Henderson, Texas 75652

Jackson Parish Broadcasting, Inc.
Radio Station KTOC-FM
1300 Gansville Road
Jonesboro, Arkansas 71251

22. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

23. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes a prohibited *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes a prohibited *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] On June 19, 1987, the license of Station KMJJ-FM was assigned to Radio U.S.A., Ltd. of which James A. Reeder is a principal (File No. BALH-870331HA).

[2] Included in the discussion is an April 11, 1989, "Supplement" filed by Radio USA, Ltd. For the purposes of this *Further Notice*, we have used the following reference coordinates: Shreveport, Louisiana (32-30-30 and 93-45-00); Atlanta, Texas (33-04-53 and 94-10-56); Homer, Louisiana (32-43-47 and 93-03-52); Vivian, Louisiana (32-52-42 and 93-59-06); Bastrop, Louisiana (32-49-10 and 91-54-29); San Augustine, Texas (31-31-42 and 94-06-36); Henderson, Texas (32-07-30 and 94-48-6); Ruston, Louisiana (32-31-30 and 92-38-18); Jonesboro, Louisiana (32-13-28 and 92-42-27); Stamps, Arkansas (33-21-42 and 93-30-00). In regard to El Dorado, Arkansas, we have used the following coordinates for the three stations requesting upgrades-Station KIXK (33-16-21 and 92-39-25), Station KAYZ (33-14-01 and 92-56-27), Station KLBQ (33-12-27 and 92-42-12). We recognize that some of these coordinates involve short-spacings to existing allotments. We request specific comment concerning alternative sites and/or channels which avoid these short-spacings. We discuss the various short-spacings below.

[3] For the purposes of the "omnibus" proceeding, the term "minority service" was defined to apply to a city with a significant minority population which the interested party plans to serve.

[4] In his counterproposal, Reeder also proposed the substitution of Channel 284A in lieu of the conflicting proposed Channel 259A allotment at Texarkana, Arkansas. Inasmuch as the *First Report and Order* in this proceeding, 100 FCC 2d 1332 (1985), allotted Channel 284A to Texarkana, this aspect of the Reeder counterproposal need not be considered.

[5] In regard to Class C1 and Class C2 allotments, a Class C2 allotment operates with lesser facilities which, in turn, requires lesser minimum spacings. *See* Sections 73.207 and 73.211 of the Rules.

[6] By implication, the Court also struck down the relaxation of the "no substitutions" policy that allows substitution of an omnibus allotment where the filing window has closed and the new channel meets the minimum spacing requirements at all sites specified in applications.

[7] In recognition of possible conflicts with any future resolution of a proceeding which might become necessary involving Reeder's Shreveport upgrade, we conditioned three rule making proceedings on the outcome of the *Reeder* appeal. In a companion item adopted, _____ 1989 (FCC 89- we have vacated these actions. These are upgrades at Atlanta, Texas (MM Docket No. 86-87), El Dorado, Arkansas (MM Docket No. 87-73), and Bastrop, Louisiana (MM Docket No. 87-242). To the extent these proposals were timely filed, they will be considered in this proceeding. However, because these upgrade proposals have been subject to notice and comment, we will not accept additional counterproposals that conflict with these upgrade proposals as set forth in the respective *Notices of Proposed Rule Making* in those dockets.

[8] In the interest of simplicity, we are excluding from our listing of channel allotments in a community all channel allotments that would be unaffected by the specific proposal.

[9] Tyler Far, Inc., holds a construction permit for a station on this allotment, at coordinates 32-29-40 and 95-28-55. *See* File No. BPH-870429MM.

[10] There is currently one application pending for Channel 260A at Homer. *See* File No. BPH-880705MG.

[11] There are three applicants for the Channel 258A allotment at Ruston, Louisiana. These are Jerald H. Womack (BPH-880114MS at 32-26-39 and 92-41-15), Vicar Communications, Inc. (BPH-880114NH at 32-31-30 at 92-41-06), and Sherry Williamson Pody (BPH-880114M2 at 32-34-29 and 29-36-40). The applicant for the Channel 258A allotment at Hamburg, Phillip W. O'Bryan (BPH-880328MF at 33-13-52 and 91-55-25), was returned on January 13, 1989.

[12] Inasmuch as the upgrade proposed by Station KLBQ was a timely filed counterproposal in MM Docket No. 87-73, we will not accept counterproposals in conflict with the Channel 258C2 upgrade. *See* Section 1.420(d) of the Rules. Furthermore, since we are now considering the Channel 258C2 as initially proposed by KLBQ in connection with Station KIXK upgrade on Channel 241C1, we are, to this extent, granting the KLBQ petition for reconsideration.

[13] The reference coordinates are 33-14-16 and 92-50-13.

[14] *See, Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987).

[15] A Channel 238A allotment at Jonesboro, Louisiana, and a Channel 260A allotment at Henderson, Texas would comply with the minimum spacing requirements at the respective Station KTOC-FM and Station KGRI-FM transmitter sites. In view of the fact that these modifications will enable stations KMJJ-FM to upgrade to Class C2 status, the licensee of Station KMJJ-FM will be required to reimburse Jackson Parish Broadcasting and Dean Broadcasting, Inc. for the reasonable expenses incurred in changing channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-31

In the Matter of

Amendment of Section 73.202(b),	RM-5682
Table of Allotments,	RM-5848
FM Broadcast Stations.	RM-5979
(Moscow, Ohio; Paris, Wilmore,	RM-6166
Morehead, Falmouth, Winchester,	RM-6384
Carrollton, Elizabethtown,	RM-6385
Dry Ridge, Somerset,	
and Williamstown, Kentucky)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 1, 1990; Released: February 20, 1990

By the Commission: Commissioner Marshall not participating.

1. This *Memorandum Opinion and Order* addresses specific allotments in Ohio and Kentucky that were the subject of the opinion of the United States Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989).[1] The *Report and Order* in this proceeding, 4 FCC Rcd 3441 (1989), issued prior to the *Reeder* decision, made a number of allotments conditioned on the outcome of the *Reeder* appeal. After the court issued the *Reeder* decision, L.M. Communications, Inc. ("LM"), licensee of Station WCOZ-FM, Channel 244A, Paris, Kentucky, filed a petition for reconsideration of the *Report and Order*. John Pierce ("Pierce"), by his attorneys, filed an opposition to LM's petition for reconsideration and LM filed a reply. Premier Broadcast Group ("Premier") (formerly WKDJ, Inc.), licensee of Station WLFX-FM (formerly WFMI-FM), Channel 261C2, Winchester, filed a motion to sever the Winchester proposal from this proceeding. Pierce and LM filed oppositions and Premier filed a reply.[2]

BACKGROUND

2. LM submitted a counterproposal in this proceeding requesting the substitution of Channel 245C2 for Channel 244A at Paris and the modification of its authorization for WCOZ-FM accordingly. The Paris substitution, however, would be short-spaced to Channel 242A at Wilmore, Kentucky, a channel allotted in Docket 84-231. In compliance with the no substitutions policy then applicable to Docket 84-231 channels, LM proposed the substitution of Channel 221C2 for Channel 242A at Wilmore. LM noted that the Wilmore substitution would create a short-spacing to noncommercial educational station WFPK-FM, Channel 220C1, Louisville, Kentucky, and requested that the channel be reclassified as a Class C2 station. The Deputy Chief, Policy and Rules Division ("Division"), declined to reclassify Channel 220C1 at Louisville and rejected LM's counterproposal in the *Report and Order*. The *Report and Order* also noted that, contrary to policies adopted in Docket 84-231, no Class A channels were available for substitution at Wilmore that would meet the requirements of the post-window substitutions policy then applicable to Docket 84-231 channels.

3. The *Report and Order* also allotted Channels 245A and 293A to Dry Ridge, Kentucky, and to Williamstown, Kentucky, respectively as the first local service for each community, and dismissed a petition to allot Channel 298A to Moscow, Ohio. At the request of Premier, the *Report and Order* substituted Channel 261C2 for Channel 261A at Winchester, Kentucky, and modified the license of Premier, licensee of Station WLFX-FM, Winchester, accordingly. The Winchester substitution required substitutions of Channel 253A for Channel 261A at Elizabethtown, Kentucky, Channel 237A for Channel 261A at Carrollton, Kentucky, and Channel 298A for Channel 237A at Falmouth, Kentucky, and modification of the licenses for stations on each of these allotments accordingly. At the request of First Radio, Inc. ("First Radio"), the *Report and Order* also substituted Channel 246C2 for Channel 244A at Somerset, Kentucky, and modified the license of First Radio, licensee of Station WSEK-FM, Somerset, accordingly.

4. Following the release of the *Report and Order*, James P. Gray ("Gray"), the sole proponent of the Dry Ridge allotment, filed a notice withdrawing his petition for rule making. LM filed a request to delete the Dry Ridge allotment and to cancel the filing window for applications for that channel, noting that the absence of any continued interest in a proposed allotment is a basis for its rejection. The Division issued an *Order Granting Request for Stay* (*"Order"*), 54 Fed. Reg. 3441 (1989), of the filing window for the Dry Ridge allotment. [3]

THE PLEADINGS

5. LM argues that the *Reeder* decision requires the Commission to consider its substitution proposal *nunc pro tunc* and to substitute Channel 245C2 for Channel 244A at Paris. LM submits an engineering statement claiming that the substitution of Channel 245C2 for Channel 244A at Paris could be accomplished through the substitution of Channel 290A, Channel 241A or Channel 221C2 for Channel 242A at Wilmore.[4] LM states that the substitution of Channel 241A for Channel 242A at Wilmore would require the substitution of Channel 277A for Channel 240A at Stanford, Kentucky, and the modification of the license of WRSL-FM, Stanford, accordingly. Furthermore, LM notes, the Stanford allotment would be short-spaced to an application for Channel 275A at Mount Vernon, Kentucky. LM notes that the deletion of Channel 245A at Dry Ridge would be a necessary component of each plan, but that the allotment can be deleted because Gray has withdrawn the sole timely expression of interest in the allotment. Furthermore, LM claims the need to accommodate its proposal following the *Reeder* decision compels deletion of the Dry Ridge allotment. LM notes that in each instance the applicants for Channel 242A at Wilmore would be required to amend their applications to specify the new channel and, if Channel 290A is substituted for Channel 242A, to specify new sites as well.

6. LM notes that the Paris substitution requires that a site restriction be placed either on Channel 245C2 at Paris or on Channel 246C2 at Somerset. LM suggests that a site restriction be placed on the Somerset channel. LM claims that a site restriction at Paris, as previously suggested by First Radio,[5] would reduce the service gains that could otherwise be achieved by LM's proposal. LM claims that Channel 245C2 at Paris operating from its present transmitter site would bring additional service to over 200,000 persons over an area of 2,610 square miles and would serve a total of approximately 466,965 persons, whereas a similar operation from the restricted site suggested by First Radio would serve 407,915 persons. LM concludes that the site restricted allotment represents a loss of service to more than one-fourth of the population gain area that could be achieved by LM's proposal. LM claims that a site restriction on the Somerset allotment would reduce the Somerset station's Class C2 coverage by 8,923 persons, or 4.8 percent. LM also claims that First Radio has previously stated a willingness to accept virtually the same site restriction proposed by LM.[6] LM further claims that a site restriction at Somerset would maximize the service gains obtained from each upgrade. LM also claims that First Radio will be required to construct a new tower in any event to implement Class C2 service, whereas LM proposes to use its present site for Class C2 service.

7. LM argues that even absent the *Reeder* decision, the Division erred in rejecting its counterproposal proposing the substitution of Channel 221C2 for Channel 242A at Wilmore. LM claims that the *Report and Order* offered no explanation of the Division's refusal to reclassify Channel 220C1 at Louisville as a Class C2 station to accommodate the substitution. LM argues that reclassification of the Louisville channel as a Class C2 facility would fully protect that station's existing facilities and permit an increase of its facilities in the future. LM notes that it obtained an affidavit from an official of the Louisville station stating that the official supported the downgrading of its station. LM also argues that there is no substantial basis for the concern in the *Report and Order* that a Channel 221C2 facility could not provide line-of-sight service to Wilmore. According to LM's engineering statement, terrain profiles demonstrate that city grade service to Wilmore would be feasible. LM claims that the rejection of its proposal without any meaningful consideration does not satisfy the standards of reasoned decisionmaking required by the Administrative Procedure Act (APA).

8. In his opposition, Pierce claims that he was preparing to file an application for the Dry Ridge allotment, that his statement to this effect constitutes expression of interest in the allotment, and that LM is incorrect in implying that no expression of interest exists in the allotment. Pierce also claims that the *Reeder* decision does not entitle LM to *nunc pro tunc* or any other special consideration of its proposal, but instead holds that LM's proposal must be considered with other conflicting proposals.

9. In reply, LM states that Pierce's expression of interest in the Dry Ridge allotment is untimely. LM notes that Pierce did not express an interest in the allotment until he submitted his petition for reconsideration of the *Order* staying the Dry Ridge application filing window. LM argues that the Commission will not accept untimely expressions of interest in contested rule making proceedings, and that Pierce, by failing to file a timely expression of interest, assumed the risk that the Dry Ridge allotment would not be made or that the proponent of the allotment would withdraw its interest. LM also maintains that Pierce's interpretation of *Reeder* is incorrect, and that LM is entitled to *nunc pro tunc* consideration of its original upgrade proposal. Finally, LM argues that the restoration of Channel 237A to Falmouth in *Memorandum Opinion and Order (Walton and Falmouth, Kentucky)*, 53 Fed. Reg. 51555 (1988), removed the predicate upon which the Dry Ridge allotment was based, thereby making LM's counterproposal the only remaining viable alternative to the allotment proposed in this proceeding.

DISCUSSION

10. After further review and careful consideration of the record in this docket, we believe it is in the public interest to delete the allotment at Dry Ridge. The sole proponent of the Dry Ridge allotment has withdrawn his interest in the allotment. No other party filed a timely expression of interest prior to issuance of the *Report and Order* in this proceeding. Pierce's statement of interest is untimely. Although the Commission does not require that every potential applicant for a channel participate in the allotment process, failure to participate places potential applicants at risk that no party will file a timely expression of interest or that a party may withdraw its expression of interest. Acceptance of late-filed comments supporting an allotment proposal is limited to situations where there is no opposition to the proposal and where there would be no adverse impact on another pending proposal. Acceptance of Pierce's untimely expression of interest would effectively foreclose consideration of LM's timely filed counterproposal. *See Memorandum Opinion and Order (Santa Isabel, Puerto Rico)*, 3 FCC Rcd 2336 (1988), *aff'd*, 4 FCC Rcd 3412 (1989), *appeals docketed, sub nom. Amor Family Broadcasting Group et al. v. FCC*, No. 89-1366 *et al.* (D.C. Cir. June 6, 1989). Accordingly, Channel 245A is deleted from Dry Ridge, Kentucky.[7]

11. The deletion of Channel 245A at Dry Ridge permits the substitution of Channel 245C2 for Channel 244A at Paris. We believe that this substitution serves the public interest because it will improve WCOZ's service to the Paris area. To accommodate the upgrade, we will substitute Channel 290A for Channel 242A at Wilmore.[8] The use of Channel 290A at Wilmore was previously precluded by the no substitutions and post-window substitutions policies adopted in Docket 84-231 but rejected by the *Reeder* court. The substitution at Wilmore requires that the three applicants for that allotment amend their applications to specify the new channel and to specify non-conflicting channel sites.[9] We also modify the authorization of Station WCOZ-FM, Channel 244A, Paris, to specify operation on Channel 245C2.[10]

12. Channel 245C2 at Paris is short-spaced to the proposed substitution of Channel 246C2 at Somerset. LM suggests a site restriction on the Somerset allotment. LM argues that a site restriction at Somerset would maximize the total population served by the two channels, and First Radio has offered no evidence to the contrary. Furthermore, First Radio previously expressed its willingness to accept a site restriction for Channel 246C2.[11] Therefore, we believe that a site restriction at Somerset, and not at Paris, is in the public interest. Accordingly, we modify the site coordinates for Channel 246C2 at Somerset to specify a site restriction of 13.7 kilometers (8.5 miles) south of Somerset.[12] Although the Somerset site is short-spaced to seven of the eleven applicants for Channel 246C2 at

Goodlettsville, Tennessee, the affected applicants will be permitted to amend their applications to meet spacing requirements to the Somerset allotment.[13]

ORDERING CLAUSES

13. Accordingly, pursuant to the authority contained in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Dry Ridge, Kentucky	---
Paris, Kentucky	245C2
Wilmore, Kentucky	290A

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of L.M. Communications, Inc. for Station WCOZ-FM, Paris, Kentucky, IS MODIFIED, to specify operation on Channel 245C2 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following applicants for Channel 242A at Wilmore, Kentucky:

Absolute Broadcasting Company
Box 2275 1
Knoxville, TN 37933
(File No. BPH-880728MD)

The Cromwell Group, Inc.
P.O. Box 150846
Nashville, TN 37215
(File No. BPH-880727MM)

Marianne Warnock
P.O. Box 671445
Marietta, GA 30067
(File No. BPH-880727NE)

16. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following applicants for Channel 246C2 at Goodlettsville, Tennessee:

Bledsoe Communications, Ltd.
2100 W. End Avenue,
Suite 900
Nashville, TN 37203
(File No. BPH-861216MD)

Goodlettsville Associates
7349 Lullwater Road
Columbus, TN
31904
(File No. BPH-861217NB)

DG Enterprises, Inc.
964 McCrory Creek Road
Nashville, TN 37214
(File No. BPH-861217ML)

Richard S. Francis
67 Hidden Valley Road
Brentwood, TN 37027
(File No. BPH-861217NA)

William E. Benns, III
1403 Hickman Road
Virginia Beach, VA 23452
(File No. BPH-861217MQ)

Heidelberg-Stone Broadcasting Company
3149 Gynnwood Drive
Nashville, TN 37207
(File No. BPH-861217MA)

Tennessee Women in Broadcasting, Inc.
3866 Dickerson Road
Nashville, TN 37207
(File No. BPH-861217MT)

17. IT IS FURTHER ORDERED, That the petition for reconsideration filed by L.M. Communications, Inc., IS GRANTED.

18. IT IS FURTHER ORDERED, That the petition for reconsideration of the February 2, 1989, *Order Granting Request for Stay* filed by John Pierce IS DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED, That the motion to sever filed by Premier Broadcast Group IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The *Reeder* court rejected, *inter alia*, the "no substitutions" policy, which prohibited allotment proposals requiring a channel substitution for a Docket 84-231 allotment unless the petitioner demonstrated a compelling need for the substitution or Commission error, and the "post-window substitutions policy", which permitted acceptance of petitions proposing a channel substitution for a Docket 84-231 allotment after the filing window for that channel had closed if the proposed substitute channel met the spacing requirements to each site specified in the applications on file for that channel on the date that the petition was accepted.

[2] Filing a petition for reconsideration of the *Report and Order* stayed that portion of the *Report and Order* modifying authorizations to specify operation on different channels pending action on the petitions. *See* Section 1.420(f) of the Commission's

rules, 47 CFR 1.420(f). Resolving the petitions for reconsideration removes the stay. Accordingly, Premier's motion to sever in order to remove the stay is moot.

[3] Pierce filed a petition for reconsideration of the *Order* in which he stated his intention to apply for the allotment. LM filed an opposition and Pierce filed a reply. Because these pleadings present arguments largely identical to those contained in the pleadings relating to LM's petition for reconsideration, we consolidate both reconsideration proceedings and address the issues surrounding the *Order* in our discussion of LM's petition for reconsideration.

[4] LM also suggested the substitution of either Channel 237A or Channel 298A for Channel 242A at Wilmore as alternatives to achieve the Paris substitution. The use of Channel 237A at either Wilmore or Falmouth conflicts with the substitution of Channel 237A for Channel 261A at Carrollton, a substitution necessary to upgrade the Winchester station. Channel 237A is the only feasible substitute channel at Carrollton. Therefore, use of Channel 237A at Wilmore would require denial of the Winchester upgrade. Moreover, use of Channel 298A at Wilmore would require the retention of Channel 237A at Falmouth, thereby also requiring denial of the Winchester upgrade.

[5] *See* "Reply Comments of First Radio, Inc. to Counterproposal of LM Communications, Inc." in MM Docket No. 88-31, submitted June 10, 1988.

[6] LM claims that in a petition for rule making filed on December 17, 1986, requesting the allotment of Channel 246C2 at Somerset, First Radio proposed an alternate site with a site restriction of approximately 15 kilometers south of Somerset to avoid a short-spacing to LM's proposed Paris substitution. LM claims that First Radio incorporated its petition into reply comments in MM Docket No. 86-379, and also identified the alternative site in comments filed in MM Docket No. 87-494.

[7] Deletion of the Dry Ridge allotment renders moot Pierce's petition for reconsideration of the *Order* staying the filing window for the allotment, LM's opposition to Pierce's petition, and Pierce's reply.

[8] Coordinates for Channel 290A at Wilmore are 37-48-10 and 84-40-43, with a site restriction of 6.9 kilometers (4.3 miles) south to avoid short-spacing to Station WCGW-FM, Channel 292A, Versailles, Kentucky.

[9] The applicants for Channel 242A at Wilmore are Absolute Broadcasting Company (File No. BPH-880728MD), Marianne Warnock (BPH-880727NE) and The Cromwell Group, Inc. (File No. BPH-880727MM). These applicants will be served with a copy of this *Report and Order* and required to amend their applications accordingly.

[10] Accommodation of LM's counterproposal in this manner eliminates the need to review our rejection in the *Report and Order* of LM's original counterproposal to substitute Channel 221C2 for Channel 242A at Wilmore, or to address LM's argument that the *Reeder* decision requires the Commission to consider LM's substitution proposal *nunc pro tunc*.

[11] *See* "Comments of First Radio, Inc." in MM Docket No. 87-494.

[12] The restricted site coordinates for Channel 246C2 at Somerset are 36-58-00 and 84-34-00. Coordinates for Channel 245C2 at Paris are 38-07-37 and 84-21-09.

[13] The applicants are Bledsoe Communications, Ltd. (File No. BPH-861261MD), DG Enterprises, Inc. (File No. BPH-861217ML), William E. Benns, III (File No. BPH-861217MQ), Tennessee Women in Broadcasting, Inc. (File No. BPH-861217MT), Goodlettsville Associates (File No. BPH-861217NB), Richard S. Francis (File No. BPH-861217NA), and Heidelberg-Stone Broadcasting Company (File No. BPH-861217MA). These applicants will be required to amend their applications. They will also be served with a copy of this *Memorandum Opinion and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-231

In the Matter of

Implementation of BC Docket
No. 80-90 to Increase the
Availability of FM Broadcast
Assignments.

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 1990; Released: February 20, 1990

By the Commission: Commissioner Marshall not participating.

1. This *Memorandum Opinion and Order* is the first step in complying with the decision of the United States Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989). The court struck down three policies implemented in this proceeding on the grounds that they had been adopted without proper notice and comment procedures, and remanded the proceeding for appropriate action consistent with its opinion.[1]

2. First, the court struck down the Commission's refusal to consider counterproposals unless they fell within certain limited categories. This policy will be referred to hereinafter as the "counterproposal limitations". Second, the court struck down the Commission's subsequent refusal to consider proposals advanced after the *First Report and Order* in MM Docket 84-231, 100 FCC 2d 1332 (1985), but before the application filing window for the new allotment had closed, that required as a component part of the proposal a channel substitution for a Docket 84-231 allotment. This second policy will be referred to hereinafter as the "no substitutions policy". Third, by implication, the court struck down that portion of the no substitutions policy that allows a petitioner to advance a proposal involving a channel substitution for a Docket 84-231 allotment only if the petitioner can demonstrate that the channel substitution meets the Commission's minimum spacing requirements at the site specified in each of the applications filed for the allotment. This policy will be referred to hereinafter as the "post-window substitutions policy".

3. In vacating the counterproposal limitations and no substitutions policy and remanding the case for further proceedings, the *Reeder* court noted, "If the FCC chooses to reinstate the counterproposal rules after proper notice and comment, the court makes no judgment as to the merits of those rules."[2] Thus, the court contemplated that we might not reinstate the counterproposal limitations and no substitutions policy. After further consideration, we have decided that initiation of a rule making proceeding to consider adoption of the policies is not justified because other rules and changes in circumstances have rendered the policies moot. The policies adopted were intended to apply only to the allotments proposed in Docket 84-231. However, the initial comment date for all of the allotments in Docket 84-231 has passed and any counterproposal now filed would be considered untimely pursuant to Commission rules unaffected by the court's decision. Thus, the counterproposal limitations are inapplicable to any newly filed rule making request. Similarly, the no substitutions policy is also inapplicable, since the filing windows for all of the Docket 84-231 allotments have opened and closed. Therefore, any proposal now filed would be unaffected by that policy. While the post-window substitutions policy would continue to apply to circumstances in which a permittee has not been chosen for a Docket 84-231 allotment, we will not seek to reinstitute this policy. Initiation of a proceeding to consider adoption of this policy would cause significant delays in approving permittees for these allotments, a result which would be contrary to our interest in the efficient and expeditious implementation of new service. Instead, consistent with the procedure normally utilized in allotment proceedings, we will not dismiss a petition for a channel substitution solely to protect preferred transmitter sites of applicants for Docket 84-231 channels. [3]

4. However, we recognize that we are required to reconsider earlier actions in which those policies were applied in a manner that prejudiced some party and in which that action remains subject to review. In order that our remedial actions proceed in an orderly fashion, we intend to apply the procedural rules normally applied in case-by-case allotment proceedings.[4] We will consider timely counterproposals[5] returned pursuant to the counterproposal limitations if that action remains subject to review. Because the initial comment period for Docket 84-231 allotments has closed, any conflicting proposal filed after the initial comment date in Docket 84-231 will not be considered as a counterproposal to the proposals initially advanced in this proceeding. Proposals submitted after the initial comment date and rejected under the no substitutions policy will be considered petitions for rule making if that action remains subject to review. Where appropriate, we will consolidate these proposals with other mutually exclusive petitions for rule making received after the initial comment date in this proceeding, and will seek comment on which of the proposals is substantively preferable. However, we will not accept counterproposals mutually exclusive with proposals already subjected to notice and comment, or treated as counterproposals in another proceeding. To treat these counterproposals in any other manner would obviate their cutoff protection, thereby removing a crucial source of certainty and finality in the allotment process.[6] We will treat petitions rejected under the post-window substitutions policy as petitions for rule making if the rejection remains subject to review. Generally, we will reinstate those petitions, and, where appropriate, seek additional comments on the substantive question of whether the proposal should be preferred over any mutually exclusive proposal.

5. Since they pursued appeals and thereby prevented final disposition, we will conduct additional proceedings where necessary for the proposals advanced by James Reeder ("Reeder"), LM Communications ("LM"), and Marine Broadcasting Corporation ("Marine"). Reeder advanced a timely counterproposal in Docket 84-231, but it was rejected pursuant to the counterproposal limitations. Reeder also advanced a number of rule making proposals distinct from its counterproposal that involved commu-

nities not a part of its counterproposal. We will consider Reeder's counterproposal and its separate and subsequent rule making proposals by means of a separate *Further Notice of Proposed Rule Making* in this docket.[7]

6. LM's original request in this proceeding was filed as a petition for reconsideration, and alternatively captioned as a petition for new rule making. As a part of its request, LM sought substitution of a new channel for a channel allotted in Docket 84-231. Because LM's petition was returned pursuant to the no substitutions policy, we will treat LM's proposal as a petition for rule making. We note that LM's petition, and proposals in conflict with LM's petition, have been examined in MM Docket 88-31.[8] Because final action has not been taken in Docket 88-31, and proposals in conflict with LM's proposal have been advanced in that docket, we will examine LM's petition in Docket 88-31. Because these proposals have already been subject to notice and comment, we will not accept as counterproposals any other petitions for rule making filed after the initial comment date in Docket 88-31.

7. Marine's interest in this proceeding arises from a petition for rule making filed on May 28, 1985, requesting a channel upgrade that required the substitution of channels for two allotments made in Docket 84-231. The petition was returned as not acceptable for rule making pursuant to the no substitutions policy. We will consider Marine's proposal as a petition for rule making. Doing so requires several subsidiary actions. First, while Marine's appeal was pending, several parties filed petitions for rule making mutually exclusive with Marine's proposal. In MM Docket 86-65, we allotted a channel to Havelock, North Carolina. The channel is mutually exclusive with the Marine petition. The allotment was, therefore, conditioned upon the outcome of the *Reeder* decision.[9] In light of the court's decision in *Reeder*, we hereby vacate the allotment made in Docket 86-65. We also proposed a channel substitution at Hertford, North Carolina, in MM Docket 88-194.[10] That substitution is contingent on approval of the proposal in Docket 86-65. Both of these proposals must be consolidated for consideration with Marine's petition. Second, although we would normally proceed by means of a *Further Notice of Proposed Rule Making* to jointly consider Marine's proposal with the proposals for Havelock and Hertford, events transpiring since the Court of Appeals' decision warrant an alternate approach. Specifically, by *Notices of Proposed Rule Making* in MM Dockets 89-326 and 89-327, the staff, acting on delegated authority, proposed changes in the FM Table of Allotments for the state of North Carolina. These proposed changes were not mutually exclusive with the Marine, Hertford, or Havelock proposals. However, counterproposals filed in the two proceedings have created a daisy chain of mutually exclusive proposals, and the Hertford, Havelock, and Marine proposals are links in that chain.[11] In such circumstances, the staff's practice is to issue a public notice listing the proposals, indicate that the proposals will be considered as counterproposals, and afford interested parties time in which to submit pleadings addressing the counterproposals. We see no reason to depart from that practice. Accordingly, we direct the staff to consolidate MM Dockets 89-326 and 89-327, and consider the Marine, Hertford, and Havelock proposals in those proceedings.[12]

Ordering Clauses

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the listed below, to read as follows:

City	Channel No.
El Dorado, Arkansas	227A, 240A, 257A, 276A
Bastrop, Louisiana	232A, 261A, 277A
Havelock, North Carolina	285A
Atlanta, Texas	257A

9. IT IS FURTHER ORDERED, That the actions in MM Docket Numbers 87-242 and 86-87, and RM-5381 are consolidated with this docket for further consideration consistent with this *Memorandum Opinion and Order.*

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, except as otherwise provided in this *Memorandum Opinion and Order.*

11. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We will address the court's action remanding the allotment of an FM channel to Semora, North Carolina, in Docket 84-231 in a separate *Memorandum Opinion and Order.*

[2] *Reeder*, 865 F.2d at 1305.

[3] *See Memorandum Opinion and Order* in MM Docket No. 86-100 (Freedom and Morgan Hill, California), 4 FCC Rcd 3927 (1989) (Commission generally does not protect an applicant's preferred transmitter site from a rule making petition proposing a new service); *Report and Order* (Dunn, Fuquay-Varina, Hope Mills, Topsail Beach, and Williamston, North Carolina), 4 FCC Rcd 2301 (1989) (applied-for site cannot be considered as anything more than a mere preference). However, we continue to be concerned with unnecessary disruption to the application process.

[4] In the typical allotment proceeding, when a *Notice of Proposed Rule Making* proposing an allotment is released, a period for filing comments to the proposal opens. Comments proposing a conflicting use for that channel at a different community are treated as counterproposals and are consolidated with the original proposal if they are advanced by the initial comment date in the proceeding. Once the comment period ends, additional communities are "cut off" from the proceeding. A conflicting proposal involving a new community submitted after the close of the comment period is not considered in the proceeding, although once the proceeding is closed we may initiate a separate rule making proceeding to consider that proposal, provided that the actions taken in the earlier proceeding do not foreclose that

proposal or, if the new proposal conflicts with an earlier allotment, if a suitable substitute channel is available for the earlier allotment. After the pleading cycle closes we then determine if all of the conflicting, timely filed proposals can be accommodated in some manner, such as through the use of site restrictions or allotment of different channels to the communities. If all proposals cannot be accommodated, the Commission performs a substantive comparison and determines which proposal would best serve the public interest. A petitioner dissatisfied with the result may file a petition for reconsideration or application for review. Failure to file for reconsideration or review results in the termination of that party's interests in the proceeding.

[5] The distinction between a counterproposal to an allotment proceeding and a petition for rule making may determine the procedural posture of a given proposal and, therefore, the nature of the remedial action necessary. A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. Section 1.420 of the Commission's rules, 47 CFR § 1.420, requires that a counterproposal be advanced in initial comments and not be considered if advanced in reply comments. Furthermore, we have consistently held that a petition for reconsideration of an allotment action will not be considered if it advances a proposal that, had it been filed by the initial comment deadline, could have been considered as a counterproposal. *See, e.g., Memorandum Opinion and Order*, 2 FCC Rcd 1290 (1987).

[6] *Cf. Ridge Radio Corp. v. FCC*, 292 F.2d 770 (1961) (cut-off dates necessary to prevent inordinate delays arising through "daisy chain" conflicts).

[7] This remedial action will also require reconsidering our actions in MM Docket No. 87-242 (allotment to Bastrop, Louisiana), MM Docket No. 87-73 (RM-5381, allotment to El Dorado, Arkansas), and MM Docket 86-87 (allotment to Atlanta, Texas). In each instance, the finality of the proceedings was made contingent on the outcome of *Reeder*. We hereby vacate our actions in these proceedings with respect to the named communities. The Atlanta, Texas, allotment was the subject of a Commission action on December 19, 1988, in which we denied Radio U.S.A.'s application for review of the staff action denying a request to stay the Atlanta proceeding. The court issued its decision in *Reeder* before we released the text of the Atlanta decision. In light of the court's decision, we never released the text of that decision and we now believe it appropriate to reconsider that action on our own motion. Therefore, we hereby dismiss Radio U.S.A.'s application for review in MM Docket No. 86-87 as moot in view of our action vacating the allotment to Atlanta. Finally, we note that petitions for reconsideration of MM Docket Nos. 87-242, 87-73 and 86-87 are pending, and we hereby consolidate these petitions, to the extent that they advocate allotments mutually exclusive with Reeder's proposals, with our consideration of Reeder's counterproposal in this docket.

[8] *See Report and Order (Moscow, Ohio; Paris, Wilmore, et al.*, Kentucky), 4 FCC Rcd 3441 (1989). A petition for reconsideration of the *Report and Order* was filed by LM, and notice of the petition was given in Public Notice No. 2695, 54 Fed. Reg. 20916 (May 15, 1989).

[9] *See Report and Order* (Havelock, North Carolina), 2 FCC Rcd 3319 (1987).

[10] *See Notice of Proposed Rule Making* (Hertford, North Carolina), 3 FCC Rcd 2695 (1988). Maranatha Broadcasting Company, Inc., the proponent of the channel substitution, was the sole commenter in the proceeding.

[11] A counterproposal filed in Dockets 89-326 and 89-327 proposes a channel upgrade at Shallotte, North Carolina, which requires the substitution of channels at Longwood, North Carolina, and Murrells Inlet, South Carolina. The Murrells Inlet substitution is mutually exclusive with a rule making petition proposing the allotment of a channel to Bucksport, South Carolina (RM-6511). The Bucksport proposal, in turn, is mutually exclusive with one of the channel substitutions proposed in Marine's petition and with a petition proposing channel substitutions at Surfside Beach, Scranton, and Johnsonville, South Carolina (RM-6448).

In addition, a petition for rule making proposing channel substitutions at North Myrtle Beach, St. Stephen, and Loris, South Carolina, has been filed. The Loris substitution is mutually exclusive with the proposal in Docket 89-327 to allot Channel 235A to Longwood. The St. Stephen substitution is mutually exclusive with a proposal to allot a channel to Stallsville, South Carolina (RM-6840). The North Myrtle Beach substitution is mutually exclusive with a proposal to allot a channel to Georgetown, South Carolina (RM-6836). Finally, a proposed channel substitution at Darlington, South Carolina, is contingent upon approval of the North Myrtle Beach substitution.

[12] The staff's public notice normally establishes a fifteen day period in which parties may file pleadings addressing the counterproposals. We see no reason to depart from this timing. However, due to the complexity of this proceeding, we direct the staff to liberally accept any pleadings responsive to the pleadings filed during the initial fifteen day period if those responsive pleadings are filed within 30 days after the date of the staff's public notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-231

In the Matter of

Implementation of BC Docket
No. 80-90 to Increase the
Availability of FM Broadcast
Assignments.

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 1990; Released: February 20, 1990

By the Commission:

1. This Memorandum *Opinion and Order* responds to a portion of the decision of the United States Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989). In that decision, the court addressed a number of appeals of our actions in MM Docket 84-231. In this document, we address the court's action vacating and remanding a specific FM channel allotment made to Semora, North Carolina, for further proceedings to address the questions of whether Semora is a community for allotment purposes, and whether Semora should be accorded a dispositive first local service preference as against a competing allotment proposal for South Boston, Virginia.[1] We find that Semora is a community for allotment purposes, but we do not reach the question of whether Semora should be accorded a dispositive first local service preference, as an alternative channel is available for allotment to South Boston.

BACKGROUND

2. In the *Notice of Proposed Rule Making* in Docket 84-231,[2] the Commission proposed allotting Channel 294A to South Boston, Virginia, as that community's second local FM station. Ansun Broadcasting Company ("Ansun") filed a mutually exclusive counterproposal to allot Channel 294A to Semora, North Carolina, as that community's first local FM station. Roxboro Broadcasting Company ("Roxboro") and LCH Broadcasting Group ("LCH") filed oppositions to the counterproposal. Roxboro argued that Semora did not constitute a community for allotment purposes. The Commission allotted the channel to South Boston, stating that the Semora allotment would be short-spaced to an allotment at Salisbury, North Carolina. [3] Ansun filed a petition for reconsideration of the decision, and Roxboro filed an opposition. On reconsideration, the Commission reversed its earlier decision and allotted Channel 294A to Semora with a site restriction to prevent short-spacing to the Salisbury channel.[4] The Commission did not discuss the community status issue raised by Roxboro. LCH and Roxboro filed petitions for reconsideration of the decision to allot the channel to Semora, arguing that Semora was not a community, and, if Semora was found to be a community, that it did not warrant a dispositive first local service preference as against South Boston under the Commission's "quiet village" doctrine.[5] Ansun filed an opposition to the petitions, and Roxboro filed a reply. We affirmed our decision, finding Semora to be a community.[6]

3. Roxboro and LCH appealed the Commission's decision to the Court of Appeals, arguing that the Commission did not address its claims that Semora was not a community and, if Semora was a community, that it was not entitled to a Section 307(b) preference over South Boston. The court found that the Commission did not address the contention that the services in Semora are not aimed primarily at Semora residents but at a larger geographic area, and are therefore insufficient under applicable precedent to prove community status. Furthermore, the court stated that the Commission failed to consider the applicability of the quiet village doctrine.[7] As a result, the court vacated the decision granting an allotment to Semora and remanded the case to the Commission for further consideration.

DISCUSSION

4. After further review and careful consideration of the record in this case, we are convinced that Semora, North Carolina, is a community for allotment purposes. The Commission's policy is that, if a community is not incorporated or listed in census reports, the proponent of an allotment must show the place to be a geographically identifiable population grouping.[8] The proponent need not show that the borders of the locality are precisely ascertainable. Instead, what must be shown is that residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents *or* by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'". *Beacon*, 2 FCC Rcd at 7562 [emphasis in original]. Examples of objective indications of community status include the existence of political, commercial, social and religious organizations and services in the community. Another indication of community status is "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce."[9]

5. Although not listed in the census reports, Semora has an estimated population of 150.[10] The Commission has allotted channels in the past to communities with lesser populations.[11] Furthermore, Semora is not a small municipality on the fringe of a larger urban area. In many of the cases in which the Commission has determined that a municipality is not a community for allotment purposes, the finding was directly related to the proximity of that municipality to a larger metropolitan area.[12] Such cases are distinguishable from instances in which, as here, a petitioner seeks to establish the community status of a more isolated municipality.[13]

6. The record indicates that objective indicia of community status are present in Semora. Ansun submitted various items in support of its claim, such as a map showing Semora's location, receipts from local businesses giving an address of Semora, and photographs of local churches. Semora has its own post office and local volunteer fire department. A civic organization (the Semora Ruritan Club) and two churches, both of which have Semora in their names, are located in the town. The presence of

social and religious organizations suggest that they exist for the good of community residents, and not for the benefit of individuals who are "just passing through". Semora also evidences commercial activity. The town supports several stores, two restaurants, and a night club. While the amount of commercial activity in the town is limited, the Commission has never established a minimum amount of commercial activity necessary to qualify an area as a community. Furthermore, the fact that persons from outside of Semora may participate in commercial activities in the community does not foreclose a finding of community status, but instead serves as evidence that persons from surrounding areas view Semora as a center of business activities for a surrounding area. Each of the above factors in isolation would not necessarily make an area a community. However, when viewed together, the factors are strong evidence of the existence of a community.[14]

7. Ansun submitted a petition signed by a number of individuals attesting to their belief that Semora is a community.[15] In addition, letters were submitted from the Caswell County Chamber of Commerce, the Semora Ruritan Club, the Semora Volunteer Fire Department, and the County Manager of Caswell County, all of which support the contention that Semora is a community. The petition and letters constitute evidence of the subjective belief of area residents that Semora is a community.

8. Semora has no local government and provides no municipal services except for its volunteer fire department. Residents rely on the county to provide police and schools. This arrangement does not preclude finding that Semora constitutes a community. There could be any number of reasons as to why such services are provided on a county-wide as opposed to a local basis. Semora is a small community and the population may not be able to maintain an effective local police force and school district. We do not believe, however, that we should find that no community exists simply because the community is small. Moreover, the Commission does not require a municipality to provide every public service on its own in order to merit community status.[16] Similarly, the absence of a newspaper or a bank is not fatal to community status.

9. In sum, we believe that the objective indicia of community status, along with the subjective views expressed in the letters and petition, are sufficient to prove that Semora is a community for allotment purposes.

10. Our staff engineering analysis has determined that there is another available channel for use at South Boston to resolve the conflicting proposals in this proceeding. Channel 237A can be allotted to South Boston, Virginia, as that community's second local FM service,[17] thereby allowing Channel 294A to remain at Semora, North Carolina, as that community's first local service. As a result, we need not engage in a comparative analysis to determine if either community is entitled to a Section 307(b) preference. Therefore, it is unnecessary to reach the question of whether the quiet village doctrine applies in this case, and, if so, whether the doctrine would preclude giving Semora a dispositive preference over South Boston. Each community will receive a Class A station as requested by the petitioners in this proceeding.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel Number
South Boston, Virginia	237A, 248C1

12. The window period for filing applications for Channel 237A at South Boston, Virginia, will open on **April 10, 1990,** and close on **May 10, 1990.**

13. IT IS ALSO ORDERED, That the *Memorandum Opinion and Order* in MM Docket 84-231, insofar as it allotted Channel 294A to Semora, North Carolina, IS AFFIRMED.

14. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We are addressing other actions taken by the court in separate documents.

[2] 49 Fed. Reg. 11214 (1984).

[3] *First Report and Order* in MM Docket 84-231, 100 FCC 2d 1332 (1985).

[4] *Memorandum Opinion and Order* in MM Docket 84-231, 59 RR 2d 679 (1985).

[5] The quiet village doctrine states that, under certain circumstances, a decisive 307(b) preference will not be given to an exceedingly small community proposing first local service in a comparative proceeding. *See, e.g., Beacon Broadcasting*, 2 FCC Rcd 3469, 3471-72 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987).

[6] *Second Memorandum Opinion and Order* in MM Docket 84-231, 61 RR 2d 26 (1986).

[7] *Reeder*, 865 F.2d at 1305-1306.

[8] *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

[9] *See Mighty-Mac Broadcasting Co.*, 58 RR 2d 599, 603 (1985); *North Naples, Florida*, 41 RR 2d 1549, 1551 (1977).

[10] This is the population listed in the *1988 Rand McNally Commercial Atlas and Marketing Guide*.

[11] *See Seven Locks Broadcasting Co.*, 37 FCC 82, 83 (1964) (existing communities with as few as 30 persons have received allotments).

[12] *See, e.g., Penacook, New Hampshire*, 2 FCC Rcd 459 (1987) (Penacook determined to be a part of two nearby communities); *Coker, Alabama*, 43 RR 2d 190 (1978) (Coker located 10 kilometers from Tuscaloosa); *Vimville, Mississippi*, 55 RR 2d 256 (1983) (Vimville located next to Meridian); *Oak Beach and Bay Shore, New York*, 57 RR 2d 1235 (1985) (Oak Beach considered a part of Babylon, New York).

[13] The Court of Appeals has recognized that the Commission may define the term "community" differently in different contexts, and may adopt an interpretation that does not necessarily depend upon purely political boundaries. *Winter Park Commu-*

nications v. FCC, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted on other grounds sub nom. Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3427 (U.S. Jan. 9, 1990) (No. 89-453).

[14] *See Teche Broadcasting Corp.*, 52 FCC 2d 970, 973 (Rev. Bd. 1975) (test for community status encompasses consideration of the totality of the circumstances).

[15] A number of the parties who signed the petition list their mailing addresses as Semora.

[16] *Cf. Faye and Richard Tuck*, 3 FCC Rcd 5374, 5378 (1988) (manner in which public goods are provided is relevant to 307(b) inquiries, but probative value of the evidence with respect to a specific municipality depends on evidence as to how other nearby and similarly situated municipalities obtain public goods).

[17] The city reference coordinates are 36-42-00 and 78-54-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-244

In re Applications of

REBECCA RADIO OF MARCO	File No. BPH-8507110B
EMERALD SEA BROADCASTING, INC.	File No. BPH-850712OF
AFFIRMATIVE BROADCASTING CORPORATION	File No. BPH-850712TX
SHOWCASE COMMUNICATIONS, INC.	File No. BPH-850712UB
MARCO MINORITY ASSOCIATES	File No. BPH-850712UA
SUSAN G. & WILLIAM R. GASTON	File No. BPH-850712UE
MARCO SKYWAVE, INC.	File No. BPH-850712UH

For Construction Permit for a
New FM Station on Channel 224A
in Marco, Florida

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1990; Released: February 20, 1990

By the Commission:

1. *Background:* Before evidentiary hearings began in the above-captioned proceeding, we approved a settlement agreement, whereby Rowland Gulf Radio, Inc., which was not originally a party to this adjudicatory proceeding, received a construction permit for a new FM station on channel 224A in Marco, Florida. *Rebecca Radio of Marco*, 4 FCC Rcd 830, 831 ¶ 11 (1989). The settlement agreement between Rowland and the above-captioned applicants provided that Rowland would pay Affirmative Broadcasting Corporation to amend its application to substitute Rowland as the applicant, and that Rowland would pay the other six applicants to dismiss their competing applications.

2. On February 21, 1989, the Office of Communication of the United Church of Christ, as well as service area residents Joseph Sineno and Reverend David C. Smith (UCC), the National Association of Black Owned Broadcasters (NABOB), and the National Black Media Coalition (NBMC) filed petitions for reconsideration of the Commission decision approving the Marco agreement.[1] Also before the Commission is a request for stay, filed on March 9, 1989 and amended on March 10, 1989, by UCC, which the Bureau opposed on March 16, 1989. In their petitions for reconsideration, NABOB and UCC challenge the Commission's action approving the settlement agreement whereby Rowland received a construction permit for channel 224A in Marco. NBMC does not seek to disturb the result in *Rebecca Radio*, but requests that the Commission rule prohibit third-party buy-outs in future cases unless the ultimate permittee is minority-owned.[2]

3. The issue before us is whether approving a third-party settlement agreement before evidentiary hearings have begun serves the public interest. We conclude for the reasons set forth below that approving such agreements disserves the public interest by creating an economic incentive for the filing of sham applications in future cases. Having found that approval of the Marco agreement does not serve the public interest, we need not determine whether third-party agreements contravene section 311(c) of the Communications Act, sections 73.3525 and 73.3597 of the Commission's rules, and Commission precedent that only applicants having a *bona fide* intent to construct are eligible for construction permits. We therefore grant reconsideration on our own motion, disapprove the Marco agreement, return this proceeding to active hearing status, and dismiss as moot the petitions for reconsideration filed by UCC, NBMC and NABOB. [3]

4. *Petitions for Reconsideration:* We grant reconsideration on our own motion and disapprove the Marco agreement because we are concerned that its approval will encourage the filing of sham applications conceived only for the purpose of entering into a profitable settlement agreement. For the reasons set forth in our December 23, 1988 decision, we remain convinced that settlement agreements are a legitimate way of ending the cost, delay, and uncertainty of protracted litigation and of expediting new service to the public. As we there explained, substantial savings of time and cost can be realized by approving the agreement in this case precisely because the settlement was reached before the hearing began. 4 FCC Rcd at 832 ¶ 18. By the same token, a third-party settlement may be the only realistic means of settling multi-party cases where no one party has the financial resources to pay off all of its competitors. *Id.* at 831 ¶ 7.

5. Nonetheless, on further reflection, we find that the public interest benefit of expediting service to the public is outweighed by the fact that approving the Marco agreement will create an economic incentive for individuals with no real interest in building and operating broadcast stations to file sham applications in future cases. Sham applications disserve the public interest by delaying the start of new service to the public, needlessly wasting the resources of the Commission and of private individuals genuinely interested in securing a construction permit, and discouraging those most qualified to serve the public from taking the time and incurring the cost entailed in filing a broadcast application. We find the potential for abuse in future cases to be particularly acute because the Rowland agreement was entered into early in the proceed-

ing before hearings began and before these applicants invested substantial time or money in securing a construction permit for Marco. We therefore grant reconsideration on our own motion, disapprove the Marco agreement, and return the above-captioned proceeding to active hearing status.[4]

6. By this action, we do not suggest that the parties herein filed these applications for the purpose of entering into the subject settlement. Nor do we intend to cast aspersions on the integrity of any of the applicants in this case, or upon any class of applicants that decides to settle before the Commission finally disposes of its application for a construction permit. Given the cost, delay, and uncertainty of prosecuting an application through final grant of a construction permit, it is not inconceivable for a *bona fide* applicant to decide for entirely legitimate reasons to abandon its efforts to secure a construction permit at any time during the proceeding. We reject the agreement in this case not because these applicants have abused our processes, but because of our concern that approving the agreement will encourage the filing of sham applications in future cases by individuals having no real interest in securing a construction permit. In view of this potential for future abuse, we cannot conclude that approving the Marco agreement serves the public interest. Having revisited the public interest question in this manner, we reverse our initial resolution of what was a case of first impression and disapprove the settlement agreement.

7. ACCORDINGLY, IT IS ORDERED, That the petition for leave to file supplement, filed on November 16, 1989, by the Mass Media Bureau IS GRANTED and the supplement to consolidated comments, filed on November 16, 1989, by the Mass Media Bureau IS ACCEPTED.

8. IT IS FURTHER ORDERED, That *Rebecca Radio of Marco*, 4 FCC Rcd 830 (1989) IS MODIFIED, as reflected herein, and that the above-captioned proceeding in MM Docket 87-244 IS RETURNED to active hearing status.

9. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed on February 21, 1989, by Office of Communication of the United Church of Christ and National Association of Black-Owned Broadcasters, Inc., and the Motion to Sever, or In the Alternative, Petition for Reconsideration or Clarification, filed on February 21, 1989, by National Black Media Coalition, and the request for stay, filed on March 9, 1989 and amended on March 10, 1989, by Office of Communication of the United Church of Christ ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Consolidated oppositions to the petitions for reconsideration were filed on March 8, 1989 by Rowland and the Mass Media Bureau. The Bureau filed a supplement to its consolidated comments, as well as a petition for leave to file supplement, on November 16, 1989.

[2] On February 22, 1989, National Association of Broadcasters (NAB) filed a petition for Rule Making and a petition to enlarge issues in Rule Making proceeding. NAB asks that the Commission either initiate a separate Rule Making proceeding to consider the question of third-party buy-outs, or address this matter in the lottery proceeding (MM Docket No. 89-15) or in connection with its FCC Form 301 revisions (Gen. Docket No. 88-328).

[3] In granting reconsideration on our own motion, we have not reached and express no opinion on whether these petitioners have standing to seek reconsideration of the Commission's December 23, 1988 action approving the settlement agreement.

[4] UCC requests that, pending action on its petition for reconsideration, the Commission immediately stay the effectiveness of the Commission's decision approving the settlement agreement in Marco. In view of our action herein disapproving the Marco agreement and returning this proceeding to active hearing status, we will dismiss the request for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-57

In re Applications of

BRIAN ANDREW LARSON File No. BPH-880601MZ
(hereafter "Larson")

J AND B BROADCASTING File No. BPH-880602MY
(hereafter "JB")

BRUCE M LYONS File No. BPH-8806020Q
(hereafter "Lyons")

For Construction Permit
for a New FM Station on Channel 248A (97.5 MHz)
in Hoosick Falls, New York

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. JB petitioned for leave to amend its application on January 3, 1989, and Lyons petitioned for leave to amend his application on February 9, 1989. The accompanying amendments were filed after September 19, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by JB and Lyons ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-282

In re Application of

MID-OHIO COMMUNICATIONS, INC. File No. BRH-790601F6

For Renewal of License of
Station WBBY(FM), Westerville,
Ohio

ORDER

Adopted: February 8, 1990; Released: February 21, 1990

By the Commission:

1. Before the Commission are: (1) an Application for Review filed August 8, 1986 by Mid-Ohio Communications, Inc. (MOC), (2) an Opposition filed September 5, 1986 by the Mass Media Bureau, (3) an Information Statement filed October 3, 1986 by MOC, and (4) a Motion to Dismiss Information Statement filed October 15, 1986 by the Bureau.

2. These pleadings relate to the Review Board's decision denying MOC's application for renewal of its license to operate station WBBY(FM) in Westerville, Ohio. *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986). The Board found that MOC lacked candor and committed misrepresentations in claiming, during the comparative phase of this proceeding, that Richard Nourse, MOC's 24.7 percent stockholder, served as its full-time station manager. The Board found that MOC deliberately concealed the fact that Nourse had extensive outside responsibilities in connection with a family-owned business (he managed Pioneer Chevrolet-Cadillac in Marietta, Ohio, 120 miles from Westerville)[1] that cast doubt on the credibility of Nourse's claimed integration in the station's management.[2] The Board also found that MOC's characterization of Nourse's role as full-time station manager involved misrepresentations. [3]

3. We agree with the Board's resolution of this case, and we therefore adopt its decision except as otherwise indicated. Nonetheless, we wish to comment on two matters.

4. MOC complains that the Board overturned an ALJ's finding that MOC did not commit misrepresentations about Nourse's role. MOC contends that, in doing so, the Board ignored the ALJ's favorable credibility findings as to MOC's witnesses and ignored uncontroverted testimony. We find no error in the Board's action in this regard. In reaching its conclusions, the Board accorded due deference to the ALJ's findings and did not ignore the fact that certain testimony was uncontroverted. The Board's differences with the ALJ arose because (1) the Board and the ALJ differed as to the ultimate interpretation that should be given the findings of fact on which they agreed, and (2) the Board focused on aspects of the testimony which the ALJ did not specifically address. The Board did not reverse any specific factual findings by the ALJ as to which demeanor could be considered critical. Therefore, there were no relevant ALJ findings entitled to special deference. The Board has the authority to make its own credibility determinations. *See Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 870 n.23 (D.C. Cir. 1977). Similarly, the Board is not required to draw the same conclusions as MOC would like from uncontroverted testimony. Thus, MOC's complaints are without foundation.[4]

5. As an additional matter, we conclude that the disqualification of MOC on the facts of this case appropriately reflects the seriousness with which we view dishonest conduct by licensees. *See Character Qualifications*, 102 FCC 2d 1179, 1210-11 ¶¶ 60-61 (1986), recon. denied, 1 FCC Rcd 421 (1986). We especially wish to voice our disagreement with MOC's claim that the facts of this case are no more egregious than those of cases in which sanctions short of disqualification have been imposed, notably *Bay Television, Inc.*, 95 FCC 2d 181, 184-85 ¶¶ 7-10 (Rev. Bd. 1983), modified, FCC 85-58 (Mar. 25, 1985), in which a substantial comparative demerit was imposed for lack of candor. In *Bay*, an applicant voluntarily rectified a reporting violation prior to the start of the hearing. Here, by contrast, the record indicates a pattern, throughout this proceeding, of deliberate concealment and false statements regarding a matter of potentially crucial importance.[5]

6. IT IS ORDERED, That the Mass Media Bureau's Motion to Dismiss Information Statement filed October 15, 1986 IS GRANTED and the Information Statement filed October 3, 1986 by Mid-Ohio Communications, Inc. IS DISMISSED, because we find no good cause for entertaining this unauthorized pleading, which merely reports that an ALJ cited the Board's decision in this proceeding.

7. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review of Mid-Ohio Communications, Inc. filed August 8, 1986 IS DENIED.

8. IT IS FURTHER ORDERED, That the application for renewal of license of WBBY(FM) filed by Mid-Ohio Communications, Inc. (File No. BRH-790601F6) IS DENIED.

9. IT IS FURTHER ORDERED, That Mid-Ohio Communications, Inc., IS AUTHORIZED to continue operation of station WBBY(FM) until 12:01 a.m. of the ninety-first (91st) day following the release of this order to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our order, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. of the ninety-first (91st) following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate; provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the licensee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of renewal, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We agree with the Board that MOC had a clear duty to report Nourse's involvement with Pioneer. As the Board points out, MOC represented in its pleadings that Nourse *currently* served as WBBY(FM)'s station manager and specifically stated in one pleading that Nourse no longer worked at Pioneer. 104 FCC 2d at 591-93 ¶¶ 34-37. Moreover, recent cases hold that an applicant's outside responsiblities may, in appropriate circumstances, undermine the credibility of an integration proposal. *See, e.g., Berryville Broadcasting Corp.*, 70 FCC 2d 1, 11-12 ¶¶ 16-18 (Rev. Bd. 1978). Accordingly, this case is not governed by precedent such as *Warwick Broadcasting Corp.*, 15 FCC 2d 1015, 1018-19 ¶¶ 8-9 (Rev. Bd. 1969), cited by MOC.

[2] We wish to observe that Richard Nourse himself testified that MOC's attorneys were concerned that failing to disclose Nourse's outside employment might be considered deceptive. MOC Exh. 1-R at 13. We consider this additional evidence of MOC's improper state of mind. Moreover, for this reason and for reasons cited by the Board (104 FCC 2d at 592-93 ¶ 37), we reject MOC's argument that its actions are mitigated by reliance on counsel. *See Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 102-03 ¶ 43 (1981).

[3] We note the following additional evidence that Nourse's duties were not full-time throughout the relevant time period. First, Nourse's participation at management meetings declined continuously throughout the period. *See* 104 FCC 2d at 614 ¶ 39, 616 ¶ 47, 617 ¶ 54. Second, in accounting for the time Nourse spent on station affairs, MOC attempts to claim credit for time Nourse spent while primarily involved at his other employment, long distance telephone calls, visits to his parents house, and weekend work. 104 FCC 2d at 617-18 ¶¶ 55-56. Such activities do not conform to the Commission's standard of substantial participation in the day-to-day operation of the station. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989-90 (1984).

[4] MOC also complains that the Board's decision makes derogatory and unnecessary references to people involved in the automobile industry. 104 FCC 2d at 594 n.18, 597 n.20, 602. We agree that such comments are superfluous and we disavow them.

[5] Three other cases principally relied on by MOC are also distinguishable in terms of the nature and seriousness of the conduct at issue. These are: *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 520 ¶ 24 (Rev. Bd. 1982), rev. denied, 55 RR 2d 23 (1983), recon. granted in part, 99 FCC 2d 682 (1984) (the Board imposed no demerit for failure to report change in limited partner's employment, where matter was of no decisional significance and there was no intent to conceal); *Valley FM Radio*, 99 FCC 2d 924, 928-29 ¶¶ 12-14 (Rev. Bd. 1984) (the Board found no misrepresentation or lack of candor, where no issue had been designated and the ALJ -- in rejecting applicant's explanation for unattended operation -- made no finding that misrepresentation or lack of candor occurred before him); and *American International Development, Inc.*, 75 FCC 2d 109, 131-37 ¶¶ 47-57 (Rev. Bd. 1979), modified, 86 FCC 2d 808, 817-18 ¶¶ 20-21 (1981), recon. denied, 50 RR 2d 370 (1981) (substantial demerit imposed, where the applicant made four misstatements in a showing concerning programming, one of which was an inadvertent error, two of which were deemed exaggerations that were not deliberate falsehoods, and one of which was deemed inaccurate and unexplained; the Board found that the inaccuracies were not the sort of calculated deception that destroys a reasonable expectation of reliability.) These cases do not involve the type of serious misconduct found here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Applications of

TRI-STATE COMMUNITY DEVELOPMENT AND COMMUNICATIONS CORPORATION — File No. BPH-870430MR

EVANSVILLE SKYWAVE, INC. — File No. BPH-870430OK

For Construction Permit
for a New FM Station
on Channel 298A
Evansville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1990; Released: February 21, 1990

By the Commission:

1. Before the Commission for consideration are two matters arising from the prehearing phase of this proceeding. The first involves the following pleadings: (1) an Application for Review filed April 17, 1989 by Evansville Skywave, Inc. and (2) an Opposition to Application for Review filed May 2, 1989 by Tri- State Community Development and Communications Corporation. These pleadings relate to a memorandum opinion and order by the Review Board requiring Skywave to produce documents during discovery. *Tri - State Community Development and Communications Corp.*, 4 FCC Rcd 2402 (Rev. Bd. 1989).

2. The second matter is that on April 25, 1989, Skywave requested Administrative Law Judge Edward J. Kuhlmann to withdraw from presiding over this proceeding pursuant to 47 C.F.R. § 1.245. Judge Kuhlmann declined to disqualify himself. *Tri - State Community Development and Communications Corp.*, FCC 89M-1412 (May 11, 1989). Skywave filed an exception to the ALJ's ruling on May 15, and the ALJ certified the question to the Commission. *Tri - State Community Development and Communications Corp.*, FCC 89M-1480 (May 18, 1989).

I. APPLICATION FOR REVIEW

3. Tri-State sought the production of documents between the principals of Skywave and others, pertaining to Skywave, the prosecution of its application, and its proposed operation. Skywave objected to this request as overbroad and unduly burdensome and also claimed that some of the material -- which it did not specifically describe -- was protected by the attorney client privilege.

4. The ALJ rejected Skywave's claim of privilege because Skywave did not list the documents affected and did not explain specifically why the privilege applied to each such document. *Tri - State Community Development and Communications Corp.*, FCC 89M-77 (Jan. 11, 1989). On appeal pursuant to 47 C.F.R. § 1.301(a)(2), the Board upheld the ALJ's ruling. 4 FCC Rcd at 2403 ¶ 4.

5. Subsequently, Skywave submitted documents to the ALJ for *in camera* inspection. The ALJ faulted Skywave for still failing to make a particularized showing as to why the privilege applied to specific documents and also held that *in camera* inspection was not required at that time. *Tri - State Community Development and Communications Corp.*, FCC 89M-1137 (Apr. 12, 1989). Skywave supplemented its arguments to the ALJ and at the same time filed the application for review now before the Commission. The ALJ then granted Skywave's claim of privilege based on its supplemented arguments. *Tri - State Community Development and Communications Corp.*, FCC 89M-1412 (May 11, 1989).

6. As a result of the ALJ's ruling, there is no longer any dispute as to whether assertedly privileged documents will have to be disclosed. Thus, Skywave's appeal of the Board's ruling is moot.

II. REQUEST FOR WITHDRAWAL OF PRESIDING JUDGE

7. Skywave seeks the disqualification of the ALJ primarily based on a ruling he previously made in this proceeding, *Tri - State Community Development and Communications Corp.*, FCC 89M-1137 (Apr. 12, 1989). In that ruling, the ALJ granted a motion by Skywave's opponent Tri-State and added an issue against Skywave to determine whether Skywave had misrepresented that it was a two-tiered stock corporation with passive, non-voting stockholders. (The ALJ also added three other issues against Skywave.) The ALJ stated:

> Skywave urges that it has fully explained its proposal to the Commission and revealed all of its aspects. Under these circumstances, it claims, it could hardly be held to have misrepresented or deceived the Commission. The facts alleged, however, do not show that Skywave revealed its true intentions to the Commission. The actions alleged to have been untaken by Skywave Corp. [purportedly a non-voting stockholder of Skywave] do not support Skywave's claim that Skywave Corp. is passive or insulated from the voting stockholder. In some cases it could be concluded that the ownership and operational scheme was put forward by the applicant in good faith with the belief that the entity had maintained its voting/non-voting organization. *But Skywave's non - voting owners have acted similarly in past proceedings and their claims of insulation, involving similar facts, have already been found wanting. Nevertheless, Skywave continues to claim this applicant is genuine when it knows that that is not the case.* Moreover, assuming that Tri-State's allegations are a complete picture, it is not true that Skywave revealed its control to the Commission. The issue to determine whether Skywave misrepresented its control will be designated.
>
> FCC 89M-1137 at ¶ 6. (Emphasis added.)

8. Skywave contends that the quoted language indicates that the ALJ has prejudged the issue of whether Skywave misrepresented facts about its control and organization. According to Skywave, an ALJ must be disqualified when he has shown a commitment to a particular result in advance of the hearing. Additionally, Skywave asserts that other actions by the ALJ confirm his bias against Skywave. Skywave asserts that: (1) the ALJ established December 12, 1988 as the date for beginning discovery but permitted Tri-State to commence discovery at an earlier date; (2) at a pre-hearing conference, the ALJ indicated that he was willing to deny Skywave's motion to enlarge issues against Tri-State, although Skywave had not yet filed a reply; (3) the ALJ denied Skywave's motion for extension of time to oppose Tri-State's lengthy motion to enlarge issues; and (4) in granting Skywave's request for Tri-State to produce financial documents the ALJ required Tri-State to produce only documents relating to control but applied no similar limitation in granting a similar request against Skywave.

9. The ALJ responds that Skywave misconstrues the cited language in his order. He states that the paragraph merely explains the parties' arguments and does not prejudge the outcome of the designated issue. The ALJ dismissed Skywave's other claims of bias on the ground that they are not supported by affidavit as required by the rule. The ALJ also endorsed comments made by Tri-State (filed May 3, 1989) which claim that Skywave's allegations mischaracterize the record.

III. DISCUSSION

10. Skywave has not met its burden of demonstrating disqualifying bias. Alleged bias and prejudice "to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). *See also Faith Center, Inc.*, 52 RR 2d 1223, 1226 n.15 (1982). Adverse comments and rulings in a proceeding are not in themselves generally sufficient to support disqualification (although they are reviewed for evidence of extrajudicial bias). *KAYE Broadcasters, Inc.*, 35 FCC 2d 548 ¶ 3 (1972), citing *Botts v. United States*, 413 F.2d 41,44 (9th Cir. 1969).

11. Without reaching the merits of the judge's ruling adding a misrepresentation issue against Skywave, we have reviewed it for evidence of prejudgment. We read the decision simply to mean that the ALJ has examined the allegations made by Tri-State and believes that they make out a prima facie case against Skywave, which Skywave, at this point, has not successfully rebutted. The ALJ's comments thus reflect a valid exercise of his judgment based on knowledge legitimately acquired from his participation in the case and do not indicate inappropriate extrajudicial bias. We credit the ALJ's clarification of his own comments, which we presume were made in good faith. *See Barnes Enterprises, Inc.*, 66 FCC 2d 499, 502 ¶ 6 (1977).

12. We have examined Skywave's other allegations against the ALJ, and we find no support for a claim of bias. First, Skywave points to no evidence that Tri-State was permitted to commence discovery prematurely. Indeed, Tri-State responds that it commenced discovery on the established date for doing so. The record indicates that Tri-State filed its motion for production of documents against Skywave on December 12, 1988, the date established for commencing discovery by *Tri-State Community Development and Communications Corp.*, FCC 88M-3985 (Nov. 21, 1988).

13. Second, we discern no bias in the ALJ's willingness to rule on Skywave's motion to enlarge issues against Tri-State without waiting for a reply. The transcript of the pertinent prehearing conference indicates that the ALJ asked Skywave's counsel whether Skywave intended to raise additional points in its reply. When counsel did not state any additional points, the ALJ specifically instructed her that if Skywave contacted his office and indicated that Skywave had further points to raise, the ALJ would wait for a reply. Tr. at 4-7. Skywave offers no evidence that it complied with the ALJ's instructions.

14. Third, we similarly discern no bias in the ALJ's denial of Skywave's motion for extension of time, memorialized in *Tri-State Community Development and Communications Corp.*, FCC 89M-1137 (Apr. 12, 1989) at ¶ 13. Tri-State suggests that the ALJ might have been concerned that an extension of time would interfere with the scheduled hearing date. Skywave provides no support for its contrary surmise that the ALJ denied the extension because he had already decided to add an issue against Skywave and that he intended to ignore Skywave's opposition. As indicated above, the ALJ discussed Skywave's opposition in his ruling adding issues against Skywave. Without more, the denial of the extension is not evidence of bias.

15. Fourth, we see no bias in the fact that the ALJ limited the content of financial documents that Tri-State was required to disclose but put no similar limitation on material Skywave was required to disclose. Compare *Tri-State Community Development and Communications Corp.*, FCC 89M-77 (Jan. 11, 1989) at ¶ 5 with *Tri-State Community Development and Communications Corp.*, FCC 89M-886 (Mar. 20, 1989) at ¶ 3. On the one hand, the record indicates that Skywave did not object to Tri-State's document request except to the extent that certain information was deemed "proprietary," a concept that the ALJ rejected. Opposition to Motion for Production of Documents filed December 21, 1988 by Skywave at 2. On the other hand, Tri-State objected to Skywave's motion on a wholly different basis -- that of relevance. Partial Opposition to Evansville Skywave, Inc.'s Second Motion for Production of Documents filed February 21, 1989 by Tri-State at 1-2. The limitations that the ALJ placed on disclosure mirror Tri-State's objection. Thus, on its face, the ALJ's disparate treatment of the parties' document requests reflects differences in their responses, and is not evidence of bias.

IV. ORDERS

16. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed April 17, 1989 by Evansville Skywave, Inc. IS DISMISSED as moot.

17. IT IS FURTHER ORDERED, That the Exception filed May 15, 1989 by Evansville Skywave, Inc. IS DENIED and the memorandum opinion and order of Judge Edward J. Kuhlmann (FCC 89M-1412 (May 11, 1989)) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

In the Matter of

Amendment of Part 74 of the
Commission's Rules and Regulations
In Regard to the Instructional
Television Fixed Service

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1990; Released: February 21, 1990

By the Commission:

1. Before the Commission for consideration is a "Petition for Limited Reconsideration" of its *Third Report and Order* in MM Docket No. 83-523 (" *ITFS Third Order* "), 4 FCC Rcd 4830 (1989), filed by The Arizona Board of Regents for the Benefit of the University of Arizona, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, and State of Wisconsin - Educational Communications Board ("petitioners").

2. In the *ITFS Third Order*, the Commission adopted a tie-breaker criterion to use in comparative license proceedings in the Instructional Television Fixed Service ("ITFS") which result in a tie under the primary comparative criteria.[1] The Commission determined that in those tied comparative cases in which there was a significant difference in the number of students who can receive the respective proposed ITFS services, that criterion will be used to award the subject license. *Id.* at 4831; 47 C.F.R. §74.913(d). In those cases in which the difference is not significant, the facilities will be evenly divided. To determine the number of students who can receive service by the proposed facilities, the Commission decided to count all students at receive sites which are listed in the application as of the final date for filing competing applications under Section 74.911(c) (the "A" cut-off date).

3. Petitioners ask the Commission to reconsider only the date chosen as the determinative date for including receive sites for the tie-breaker criterion. Petitioners propose that all sites on file as of the final date for filing petitions to deny (the "B" cut-off date) be used instead. Petitioners point out that using the "A" date permits later-filing applicants to prepare their applications for comparative consideration with the benefit of having seen the first applicant's proposal, while the first applicant will not have a similar opportunity to respond to the proposals of any competitor(s). If final receive-site information, from which students to be served is eventually derived, is due on the "B" date, petitioners argue, all parties will have the same final date to file that potentially comparative information, enjoying the same opportunity to evaluate and respond to the proposals of any competitor(s).

4. Petitioners also point out that in adopting the current filing schedule for ITFS, the Commission apparently contemplated the filing of other amendments which could affect parties' comparative position up until the "B" date: "Also, amendments will be permitted after the 'B' list period for the purpose of keeping the applications current . . . but no comparative advantage will derive from amendments after the 'B' cut-off date." *Second Report and Order* in MM Docket No. 83-523, 101 FCC2d 49, 74 (1985). Finally, they point out that use of the "B" date would be consistent with the Commission's procedures in considering broadcast applications,[2] and that the same consideration of basic fairness should apply to the ITFS service.

5. Petitioners' arguments are well taken. No compelling argument to the contrary has been made or presents itself. Accordingly, the date for filing receive sites for consideration under the comparative tie-breaker will be changed to the "B" cut-off date.

6. *Regulatory Flexibility Act Analysis*. Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (5 U.S.C. §605(b)), it is hereby certified that the rule contained herein will not have a significant economic impact on a substantial number of small entities.

7. *Paperwork Reduction Act Analysis*. The rule contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 (44 U.S.C. §§3501 - 3520) and found to contain no new information requirement on the public.

8. Accordingly, IT IS ORDERED, That the Petition for limited reconsideration IS GRANTED, and That Part 74 of the Commission's Rules and Regulations IS AMENDED as set forth in the Appendix below, effective **April 6, 1990.**

9. IT IS FURTHER ORDERED, That the Office of the Managing Director SHALL SEND to the Chief Counsel for Advocacy of the Small Business Administration the certification that the rules adopted will have no significant impact on a substantial number of small entities.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 74 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 C.F.R. Secs. 4, 308, 48 Stat. 1066, as amended, 1082, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply Secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.913 is amended by revising the first sentence of paragraph (d)(1) as follows:

* * * * *

(d) * * *

(1) Enrollment will be considered as of the last date for filing petitions to deny against listed applications or to make minor amendments, as provided by Section 74.911(c) of this Part. * * *

* * * * *

FOOTNOTES

[1] Mutually exclusive ITFS applications are awarded points as follows: local applicants (4); accredited applicants (3); applications in compliance with the four channel limitation (2); applicants vacating E or F channels in order to expand their service (1); and aplicants proposing certain amounts of ITFS programming (1 or 2). 47 C.F.R. §74.913.

[2] 47 C.F.R. §73.3522(a)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section
0.5(d) of the
Commission's Rules
to Delete Reference to
Weekly Meetings

ORDER

Adopted: February 9, 1990; Released: February 21, 1990

By the Commission:

1. In this *Order*, we adopt, on our own motion, a minor revision to section 0.5(d) of our rules and regulations. Section 0.5(d) indicates that matters requiring Commission action are dealt with at "regular weekly meetings." 47 C.F.R. § 0.5(d). As a matter of practice, the Commission generally now holds monthly, not weekly, meetings. Accordingly, the Commission amends its rules to change the reference in 47 C.F.R. § 0.5(d) from "weekly" to "monthly" meetings.

2. This change corrects a rule of agency organization. Compliance with the notice and comment provisions and the effective date provisions of the Administrative Procedure Act is therefore unnecessary. *See* 5 U.S.C. §§ 553(b)(A), 553(d).

3. Accordingly, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), IT IS ORDERED that 47 C.F.R. § 0.5(d) IS AMENDED as set forth in the Appendix below, EFFECTIVE IMMEDIATELY upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 0 (Commission organization) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.5 is amended by revising the first sentence of paragraph (d) to read as follows:

§ 0.5 General Description of Commission Organization and Operations.

* * * * *

(d) Commission action. Matters requiring Commission action, or warranting its consideration, are dealt with by the Commission at regular monthly meetings, or at special meetings called to consider a particular matter. * * *

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-52

In re Applications of

THARPE COMMUNICATIONS, INC. (hereafter "Tharpe")	File No. BPH-880531MN
CHRISTOPHER N. TARKENTON (hereafter "Tarkenton")	File No. BPH-880601MX
TFB AND ASSOCIATES LIMITED PARTNERSHIP (hereafter "TFB")	File No. BPH-880602NB
INFO-AIR, INC. (hereafter "INFO")	File No. BPH-880602OP

For Construction Permit
for a New FM Station on
Channel 248/A (97.5 MHz)
in Hogansville, Georgia

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Hogansville applications being considered in this proceeding conflict with a pending Rule Making proceeding to modify the frequency of WKEU-FM, Griffin, Georgia, from Channel 247A to Channel 248C3. At the time that the Hogansville applications were filed, a petition for Rule Making had not been filed. Consequently, the Hogansville applications met all the spacing criteria of 47 C.F.R. § 73.207(a) and were accepted for filing. Accordingly, we will designate these applications for hearing. However, the construction permit issued to any of these applicants will be conditioned upon the outcome of the WKEU-FM, Griffin, Georgia Rule Making proceeding.

3. Tharpe petitioned for leave to amend its application on September 12, 1988. (Engineering) The accompanying amendment was filed after September 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That, in the event that a construction permit is granted to any applicant in this proceeding, it shall be conditioned upon the outcome of the WKEU-FM, Griffin, Georgia Rule Making proceeding.

7. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Tharpe IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Roy L. Morris FOIA Control No. 89-158

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1990; Released: February 21, 1990

By the Commission:

BACKGROUND

1. On September 18, 1989, Consumer Federation of America and Allnet Communication Services, Inc. (CFA/Allnet) filed a Freedom of Information Act (FOIA)[1] request, which was amended on September 27, 1989. The request sought access to all information the Common Carrier Bureau relied on in analyzing AT&T's first tariff revision under price cap regulation and determining whether AT&T complied with the price cap rules. *AT&T Communications, Revisions to Tariff F. C. C. Nos. 1 and 13, Transmittal No. 1618*, (Tariff Order), 4 FCC Rcd 5783 (Com.Car.Bur. 1989). On October 25, 1989, the Chief, Common Carrier Bureau granted in part and denied in part CFA/Allnet's FOIA request.

2. On November 24, 1989, CFA/Allnet filed an Application for Review appealing the Bureau's decision to withhold, pursuant to FOIA Exemption 5,[2] Items 6, 8 and 9 listed in Attachment II of the FOIA Decision. The Bureau characterized Item 6 as a computer printout generated by staff members depicting potential access charge increases, Item 8 as spread sheets that contain information reflecting internal deliberations regarding verification of AT&T price band calculations, and Item 9 as a computer printout reflecting AT&T tariff rate changes in the first half of 1989. In its Application for Review, CFA/Allnet argue that the Bureau improperly withheld factual material contained in the computer printouts and spread sheets.

DECISION

3. Under the deliberative process privilege of FOIA Exemption 5, an agency may withhold a document if it is both "predecisional" and a part of the "deliberative process." *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir. 1980). A document is predecisional if it was "generated before the adoption of an agency policy." *Coastal States*, 617 F.2d at 866. A predecisional document is "deliberative" if "disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C.Cir. 1987). The courts have also recognized that rigid adherence to a simple test whereby material labeled "factual" must be disclosed and material labeled "deliberative" can be withheld may result in incorrect outcomes. *See National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988); *Dudman*, 815 F.2d at 1568. As a result, courts have focused less on the nature of the material sought and more on the effect of the release of the material. *See Dudman*, 815 F.2d at 1568.

4. Turning to the documents at issue, Item 6 is a computer printout generated by the Bureau staff in connection with access charge proceedings and contains preliminary recommended decisions on revised access rates filed by local exchange carriers (LECs). The staff working on the access rate proceedings provided this document to the staff processing AT&T's tariff filing in order to provide the latter with preliminary opinions regarding the disposition of the proposed access rate revisions. CFA/Allnet argue that Item 6 is not predecisional because the Tariff Order did not involve the adoption of new access charges. As noted, however, Item 6 was generated in connection with, and prior to, the Bureau's decision addressing the proposed access rate revisions, *Local Exchange Carrier Access Tariff Rate Levels*, 4 FCC Rcd 5533 (Com.Car.Bur. 1989). Further, the tentative recommendations and supporting comments contained in Item 6 provided a starting point for Commission deliberations on the proposed access rate revisions and were not final determinations. The material thus reflects the give-and-take of the Commission's deliberative process and was properly withheld by the Bureau under Exemption 5. We note, however, that the document also contains factual information concerning the LECs' proposed access rates that was part of the public record in the access rate proceeding. This factual material is segregable from the exempt material and will be disclosed. [3]

5. Item 8 is a computer printout generated by the Commission staff which lists the upper and lower service band indexes for various services under several different methods in order to verify calculations submitted by AT&T. (The service band index measures rates for individual service categories, and the pricing bands limit price changes for a service category. *See* 47 C.F.R. § 61.47.) CFA/Allnet argue that the calculations are post-decisional and not deliberative because they involve merely the application of publicly known price cap formulas to objective data. CFA/Allnet further contend that there is no discretion in how the price cap formula is applied to data.

6. We find that Item 8 is clearly predecisional. The document was prepared in connection with the processing of AT&T's tariff revision request before the Bureau's Tariff Order was adopted. Further, the calculation portion of this document is not simply the objective application of publicly known price cap formulas to the data. For example, the Bureau Tariff Decision notes that there was considerable disagreement among the parties as to the initial date from which service band index limits should be calculated. *See Tariff Order*, 4 FCC Rcd at 5786. The staff's calculation of the service band index under several methods thus is deliberative because it reflects the staff's internal analyses and consideration of possible different interpretations of the formula. Public disclosure of such

deliberations, which were not a basis for the Bureau's ultimate action, could mislead the public. However, Item 8 also contains calculations that merely verify the calculations submitted by AT&T in its tariff filing. Since the tariff became effective on the basis of the service band levels calculated by AT&T, our verifying calculations will be disclosed pursuant to 5 U.S.C. § 552(b).

7. Item 9 is a computer printout generated by the Commission staff listing transmittals filed by AT&T in the first six months of 1989. Item 9 is predecisional, as it was prepared in connection with the processing of AT&T's tariff filing prior to the adoption of the Bureau Tariff Order. CFA/Allnet correctly point out that this listing of transmittals is purely factual and a matter of public record. The document, however, also contains handwritten notes of a staff member tentatively indicating which transmittals may be outside the scope of price caps regulation and a column which tentatively categorizes each transmittal as a change in rates, no change in rates, or a new service. These notes and categories reflect the tentative views and the mental processes of the staff, the disclosure of which would inhibit such candid deliberations. As the factual information in Item 9 can be segregated from this deliberative material, the factual information only will be disclosed pursuant to 5 U.S.C. § 552(b).

8. Accordingly, for the reasons set forth above, Morris's Application for Review is GRANTED in part and DENIED in part.

9. CFA/Allnet may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

10. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] FOIA Exemption 5, 5 U.S.C. § 552(b)(5), authorizes an agency to protect from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation."

[3] Apart from the material disclosed, the document contains no purely factual data. The material withheld consists of a column labeled "Preliminary Recommended Decision," which lists the staff's preliminary recommendation for each particular carrier and category of access service (*e.g.*, "yes," "no," "maybe") and a brief, one line comment explaining the recommendation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v. File No. E-89-410

CENTRAL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: February 5, 1990; Released: February 21, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company ("MidAmerican") filed the above-captioned formal complaint against Central Telephone Company (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against MidAmerican during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 24, 1989 and an answer was duly filed. On December 5, 1989, however, MidAmerican filed a motion for leave to withdraw its complaint, stating that it does not wish to pursue its claim against the Defendant and is seeking leave to withdraw its complaint with prejudice.

2. On the basis of the statements contained in the Motion, we conclude that there are not presently issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MidAmerican's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendments to
the Aviation Services
Rules (Part 87)

ORDER

Adopted: February 5, 1990; Released: February 21, 1990

By the Chief, Private Radio Bureau:

1. This *Order* amends Part 87 (Aviation Services) of the Commission's Rules, 47 C.F.R. Part 87, to clarify and to correct four sections of the rules. Section 87.137 of the Commission's Rules, 47 C.F.R. § 87.137, permits the use of digital data links on certain aeronautical enroute frequencies. Footnote 5 and the emissions table it accompanies are revised to indicate more clearly the emissions permissible for such data links. Additionally, Section 87.345(e), 47 C.F.R. § 87.345(e), is removed because it duplicates information found in adjacent rule sections. Further, minor non-substantive corrections are made to Sections 87.173 and 87.187, 47 C.F.R. §§ 87.173 & 87.187.

2. Because these amendments are minor, non-substantive, do not impose any additional burdens, and raise no issue on which comments would serve any useful purpose, prior notice of rule making, effective date provisions, and public procedure on such matters are not required under the Administrative Procedure Act or the Commission's Rules, *see* 5 U.S.C. § 553 and 47 C.F.R. §§ 1.412(b) & 1.427(b).

3. Accordingly, IT IS ORDERED that, under the authority contained in Sections 4(i), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), and 303(r), and Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, Part 87 of the Commission's Rules IS AMENDED as set forth in the attached Appendix, effective on publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 87 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 87 continues to read:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609, unless otherwise noted.

2. In Section 87.137, paragraph (a) is amended by adding a new row between the current fourth and fifth rows in the table and by revising footnote 5 to read as follows:

§ 87. 137 Types of emission.

(a) * * *

Class of emission	Emission designator	Authorized Bandwidth (kilohertz) Below 50 MHz	Above 50 MHz	Frequency deviation
		* * * * *		
A2D	6K0A2D		50	
A2D[5]	13K0A2D		50	
A3E[2]	6K00A3E		[3]50	

* * * * *

NOTES:

* * * * *

[5] This emission may be authorized for audio frequency shift keying and phase shift keying for digital data links on any frequency listed in § 87.263(a)(1) or § 87.263(a)(3). 13K0A2D emission may be authorized on frequencies not used for voice communications. If the channel is used for voice communications, 13K0A9W emission may be authorized, provided the data is multiplexed on the voice carrier without derogating voice communications.

* * * * *

3. In Section 87.173, paragraph (b) is amended by removing the rows that correspond to the two frequencies 2372.5 kHz and 2375.5 kHz, by removing the fifteen rows starting with frequency 4467.5 kHz and ending with frequency 4631.5 kHz, and by adding the following rows in numerical order to read as follows:

§ 87. 173 Frequencies.

(b) Frequency table:

Frequency or Frequency Band	Subpart	Class of Station	Remarks
		* * * * *	
2182.0 kHz	F	MA	International distress and calling
2371.0 kHz	R	MA, FAP	Civil Air Patrol
		* * * * *	
4466.0 kHz	R	MA, FAP	Civil Air Patrol
4469.0 kHz	R	MA, FAP	Civil Air Patrol
4506.0 kHz	R	MA, FAP	Civil Air Patrol
4509.0 kHz	R	MA, FAP	Civil Air Patrol
4550.0 kHz	I	AX	Gulf of Mexico
4582.0 kHz	R	MA, FAP	Civil Air Patrol
4585.0 kHz	R	MA, FAP	Civil Air Patrol
4601.0 kHz	R	MA, FAP	Civil Air Patrol
4604.0 kHz	R	MA, FAP	Civil Air Patrol
4627.0 kHz	R	MA, FAP	Civil Air Patrol
4630.0 kHz	R	MA, FAP	Civil Air Patrol
		* * * * *	

4. In Section 87.187, paragraphs (w)(2) and (w)(3) are revised to read as follows:

§ 87. 187 Frequencies.

* * * * *

(w) * * *

(2) FAA Flight Service Station frequencies 121.975-122.675 MHz.

(3) The unicom frequencies 122.700, 122.725, 122.800, 122.950, 122.975, 123.000, 123.050 and 123.075 MHz.

* * * * *

5. In Section 87.345, paragraph (e) is removed and paragraph (f) is redesignated as paragraph (e).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-107

In the Matter of

Amendment of Section 73.202(b), RM-6617
Table of Allotments,
FM Broadcast Stations.
(Coalmont, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. At the request of Cumberland Communication Corporation (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 3957 (1989), proposing the allotment of Channel 284A to Coalmont, Tennessee, as that community's first local FM service. Petitioner filed supporting comments and reply comments reiterating an interest in the allotment. Comments in support of the proposal were filed by Bertren H. Gilmore, Cecil A. Paden, Lucille Heronymus, Keith McBee, Rafael J. Neira, and Lawson W. and Jewell Holverstott.[1]

2. Based on the information before us, we believe the public interest would be served by allotting Channel 284A to Coalmont, as that community's first local FM service. The channel can be allotted in compliance with the Commission's minimum distance separation requirements[2] with a site restriction of 6.0 kilometers (3.7 miles) west of the community. [3] The site restriction is necessary in order to avoid a short spacing to Station WTCX(FM), Channel 285A, Dayton, Tennessee.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Coalmont, Tennessee	284A

4. The window period for filing applications will open on **April 10, 1990,** and close on **May 10, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Betty L. Gilmore and Riley Anderson, Jr., filed late comments. In accordance with Section 1.415(d) of the Commission's Rules we have not considered the late filings.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR §73.213(c).

[3] The coordinates are 35-20-22 and 85-46-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-94

In the Matter of

Amendment of Section 73.202(b), RM-6631
Table of Allotments,
FM Broadcast Stations.
(Huron, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. At the request of Dakota Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 3901 (1989), proposing the substitution of Channel 256C1 for Channel 221A at Huron, South Dakota, and the modification of its license for Station KURO-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] No opposition to the proposal was received.

2. We believe the public interest would be served by substituting Channel 256C1 for Channel 221A at Huron, South Dakota, and modifying petitioner's license for Station KURO-FM accordingly, since it could enable the station to expand its coverage area. No other party expressed an interest in use of the channel at Huron. Therefore, in accordance with Section 1.420 of the Commission's Rules, we will modify petitioner's license to specify the non-adjacent higher powered channel. Channel 256C1 can be allotted to Huron in compliance with the Commission's minimum distance separation requirements and can be used at Station KURO-FM's present transmitter site.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Huron, South Dakota	256C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Dakota Broadcasting, Inc., for Station KURO-FM, Huron, South Dakota, IS MODIFIED to specify operation on Channel 256C1, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Letters in support of the allotment were also filed by various members of the Huron community, such as the Norwest Bank South Dakota, N.A., American State Bank, Huron Chamber of Commerce, Office of the Mayor of the City of Huron, and Anderson Furniture Company.

[2] The coordinates for this allotment are North Latitude 44-20-46 and West Longitude 98-12-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-44

In the Matter of

Amendment of Section 73.202(b),	RM-7123
Table of Allotments,	
FM Broadcast Stations.	
(East Los Angeles and Long Beach,	
California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 29, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Spanish Broadcasting System of Florida, Inc. (petitioner), licensee of Station KSKQ-FM, Channel 250B, Long Beach, California, requesting the reallotment of its channel to East Los Angeles, California, and the modification of its license accordingly. Petitioner premises its proposal on the desire to bring a first local broadcast service to East Los Angeles.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner asserts that the requested move to East Los Angeles is mutually exclusive with the present allotment of Channel 250B at Long Beach. The distance between Long Beach and the site suggested by the petitioner at East Los Angeles,[2] is 32.6 kilometers, whereas a distance of 241 kilometers (150 miles) is required by Section 73.207(b) of the Commission's Rules between co-channel Class B stations. Petitioner states that its proposal could provide a first local broadcast service to East Los Angeles, and would not deprive Long Beach of local service. [3]

3. In further support of its proposal, petitioner advises that, according to the 1980 U.S. Census, Long Beach has a population of 361,334 persons while East Los Angeles has 110,087 persons. Thus, petitioner asserts, it would not be moving to a larger community.[4] Additionally, petitioner advises that although Station KSKQ-FM is authorized with "grandfathered" short-spacing to Station KIFM(FM), Channel 251B, San Diego[5] and Station KBOB(FM), West Covina,[6] the site specified at East Los Angeles would not increase the existing short-spaced distances, nor extend its 60 dBu contour toward those two stations. In fact, petitioner advises that the existing short-spacing to Station KBOB(FM) would be decreased while that to Station KIFM(FM) would be eliminated.

4. A staff engineering study confirms that Channel 250B can be allotted to East Los Angeles in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[7]

5. In light of the above, we shall propose to modify Station KSKQ-FM, as requested, to specify East Los Angeles, California, as its community of license. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 250B at East Los Angeles.

6. In view of the fact that East Los Angeles, California, could receive its first local broadcast service, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
East Los Angeles, California	--	250B
Long Beach, California	250B, 288A	288A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **April 16, 1990,** and reply comments on or before **May 5, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order*, MM Docket No. 88-526, 54 FR 26199, (June 22, 1989); *recon. pend.*

[2] Coordinates specified by the petitioner for a transmitter site at East Los Angeles, California, are 34-02-45 and 118-21-20. Coordinates at the licensed site of Station KSKQ-FM at Long Beach are 33-47-59 and 118-09-46.

[3] Petitioner advises that Station KNAC(FM), Channel 288A, is presently licensed to Long Beach. Additionally, AM Stations KFRN and KGER are located at that community.

[4] Both East Los Angeles and Long Beach are within the Los Angeles Urbanized Area, as defined by the U.S. Census. Therefore, this proposal would not result in relocation of a station from a rural area to a much larger urban area.

[5] Coordinates at the site specified in the construction permit issued to Station KIFM(FM) at San Diego are 32-50-17 and 117-14-56.

[6] Coordinates at the site specified in the construction permit issued to Station KBOB(FM) at West Covina are 34-01-22 and 117-56-15.

[7] Coordinates used in this determination are those suggested by the petitioner, as indicated, *supra*, which would place the transmitter for Channel 250B in an area 18.9 kilometers (11.7 miles) west of East Los Angeles.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos. 89-134, 139, 141, 143-146, 147, 149, 152, 154, 155, 158, 162, 167, 169, 173, 177, 183, 187, 194, 196, 211, 212, 216, 221, 224, 225, 227, 229, 230, 236, 238, 244, 245, 248, 249, 252, 254, 256, 259, 261, 268, 274, 275, 279

In the Matter of

Amendment of Section 73.202(b),
FM Broadcast Stations.
(Various locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989), proposing to amend the FM Table of Allotments for 149 communities by reclassifying to Class C3 the Class A allotments for the stations listed in the *Notice* and modifying the authorizations accordingly.[1] The *Notice* specified separate docket numbers for each of the 149 communities and stated that the proposals would be administered like routine FM allotment rule making proceedings.

2. Since the Commission on its own motion initiated the proposals licensees and permittees not wishing to pursue an upgrade in class were simply requested to disregard the *Notice*. The licensees and permittees for allotments in the 46 communities listed in Appendix A to this document either did not file comments stating an intention to apply for and construct a Class C3 facility, if allotted, or filed comments stating that they do not desire Class C3 operation.

3. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making an allotment absent an expression of interest. Since no such interest has been expressed, we will dismiss the above-mentioned docketed cases.

4. IT IS ORDERED, That the proceedings listed in Appendix A to to this document ARE TERMINATED.

5. For further information concerning the individual proceedings, contact the Allocations Branch, Mass Media Bureau, at (202) 634-6530, as follows: (1) Nancy Joyner for those stations in Arkansas, Arizona and Colorado; (2) Nancy Walls for those stations in Hawaii and Idaho; (3) Kathleen Scheuerle for those stations in Kansas, Michigan, Minnesota and Montana; (4) Leslie Shapiro for those stations in Nebraska, Nevada, New Mexico, North Dakota, Oklahoma and Oregon; and (5) Patricia Rawlings for those stations in Texas, Washington, Wyoming and Utah.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX A

Channel & Status	Location and Coordinates
1. MM Docket No. 89-134 221 CP	Tusayan, AZ 35-57-45 112-04-45
2. MM Docket No. 89-139 221 LIC	Carlsbad, NM 32-27-2 104-12-47
3. MM Docket No. 89-141 221 LIC	Enterprise, OR 45-19-1 117-13-14
4. MM Docket No. 89-143 224 LIC	Wolfpoint, MT 48-11-9 105-40-8
5. MM Docket No. 89-144 224 LIC	Ainsworth, NE 42-33-16 99-49-52
6. MM Docket No. 89-145 224 LIC	Albion, NE 41-40-45 98-00-43
7. MM Docket No. 89-146 224 LIC	Socorro, NM 34-02-43 106-54-21
8. MM Docket No. 89-147 224 LIC 3	Tucumcari, NM 5-10-15 103-42-25
9. MM Docket No. 89-149 224 LIC	Tonopah, NV 38-04-22 117-13-16
10. MM Docket No. 89-152 224 CP	Burns, OR 43-34-22 119-07-50
11. MM Docket No. 89-154 224 LIC	Rawlins, WY 41-46-16 107-14-15
12. MM Docket No. 89-155 228 CP	Delta Junction, AK 64-03-42 145-41-15
13. MM Docket No. 89-158 228 LIC	Alamosa, CO 37-28-20 105-51-13
14. MM Docket No. 89-162 228 LIC	Glasgow, MT 48-05-42 106-37-8
15. MM Docket No. 89-167 232 LIC	Quartsite, AZ 33-40-58 114-13-59
16. MM Docket No. 89-169 232 LIC	Makawao, HI 20-50-48 156-19-35
17. MM Docket No. 89-173 232 LIC	Ozona, TX 30-42-39 101-07-34

18. MM Docket No. 89-177		Phillipsburg, KS	
237	LIC	39-47-32	99-19-55
19. MM Docket No. 89-183		Hoquiam, WA	
237	LIC	46-55-53	123-44-2
20. MM Docket No. 89-187		Lewistown, MT	
240	LIC	47-04-13	109-24-26
21. MM Docket No. 89-194		Deer Lodge, MT	
244	CP	46-24-26	112-43-8
22. MM Docket No. 89-196		Sweetwater, TX	
244	LIC	32-29-16	100-23-31
23. MM Docket No. 89-211		Pecos, TX	
252	LIC	31-26-9	103-30-14
24. MM Docket No. 89-212		Spearman, TX	
252	LIC	36-12-31	101-09-31
25. MM Docket No. 89-216		Silverton, CO	
257	CP	37-48-18	107-38-3
26. MM Docket No. 89-221		Kodiak, AK	
261	LIC	57-47-41	152-23-28
27. MM Docket No. 89-224		Plentywood, MT	
261	LIC	48-47-06	104-32-0
28. MM Docket No. 89-225		Kimball, NE	
261	CP	41-15-9	103-39-49
29. MM Docket No. 89-227		Nome, AK	
262	LIC	64-30-4	165-24-39
30. MM Docket No. 89-229		Naknek, AK	
265	LIC	58-44-33	156-58-39
31. MM Docket No. 89-230		Petersburg, AK	
265	LIC	56-48-55	132-57-12
32. MM Docket No. 89-236		Sutherlin, OR	
266	CP	43-21-59	123-18-56
33. MM Docket No. 89-238		Wrangell, AK	
269	LIC	56-27-14	132-22-54
34. MM Docket No. 89-244		Haines, AK	
272	LIC	59-13-6	135-25-29
35. MM Docket No. 89-245		Houghton, MI	
272	CP	47-06-13	88-34-4
36. MM Docket No. 89-248		Woodward, OK	
272	LIC	36-24-2	99-25-44
37. MM Docket No. 89-249		Waldron, AR	
276	LIC	34-51-44	94-04-26
38. MM Docket No. 89-252		Imperial, NE	
276	CP	40-32-30	101-42-30
39. MM Docket No. 89-254		Ballinger, TX	
276	LIC	31-43-31	99-57-42
40. MM Docket No. 89-256		Yakutat, AK	
280	LIC	59-33-20	139-44-32
41. MM Docket No. 89-259		Smithfield, UT	
280	LIC	41-48-44	111-47-31
42. MM Docket No. 89-261		Juneau, AK	
282	LIC	58-18-4	134-25-21
43. MM Docket No. 89-268		Ada, MN	
292	LIC	47-18-41	96-31-13
44. MM Docket No. 89-274		Evanston, WY	
292	LIC	41-21-11	110-54-28
45. MM Docket No. 89-275		Caldwell, ID	
296	LIC	43-39-51	116-38-10
46. MM Docket No. 89-279		Coleman, TX	
296	LIC	31-51-16	99-25-36

FOOTNOTE

[1] *See* Appendix B in the *Notice* for the complete listing of stations, communities, licensees and permittees.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-52

In the Matter of

Amendment of Section 73.202(b), RM-6613
Table of Allotments,
FM Broadcast Stations.
(Marlow, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. At the request of Austin Broadcast Services, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2195 (1989), proposing the substitution of Channel 221C1 for Channel 221C2 at Marlow, Oklahoma, and the modification of its license for Station KFXI(FM) accordingly. Petitioner filed comments supporting the substitution and reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 221C1 lies within the Grade B contour of TV Channel 6 Station KAUZ-TV, Wichita Falls, Texas. Therefore, petitioner was requested to furnish additional data concerning the impact of a Channel 221C1 allotment at Marlow on noncommercial educational service within the affected area. Based on our review of petitioner's response, we find that there will be no significant adverse impact on noncommercial educational operations if Channel 221C1 is allotted to Marlow. Therefore, we believe that the public interest will be served by substituting Channel 221C1 for Channel 221C2 at Marlow, Oklahoma, since it could enable Station KXFI(FM) to expand its coverage area. Channel 221C1 can be allotted to Marlow in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, we will modify the license of Station KFXI(FM) to specify operation on the higher powered channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Marlow, Oklahoma	221C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Austin Broadcast Services, Inc., for Station KFXI(FM), Marlow, Oklahoma, IS MODIFIED to specify operation on Channel 221C1, in lieu of Channel 221C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-38-54 and West Longitude 97-57-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-51

In the Matter of

Amendment of Section 73.202(b),	RM-6576
Table of Allotments,	RM-6644
FM Broadcast Stations.	
(Port Matilda and Petersburg,	
Pennsylvania)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 21, 1990

By the Chief, Allocations Branch:

1. At the request of P.A.C. Communications, Inc. ("PAC") and Victor A. Michael ("Michael"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2193 (1989), proposing the allotment of Channel 300A to either Port Matilda or Petersburg, Pennsylvania. Port Matilda and Petersburg are located only 24 kilometers apart while the Commission's Rules require a separation of 105 kilometers between co-channel Class A allotments. Thus, the proposals are mutually exclusive. PAC and Michael filed comments. No other comments were received.

2. Michael and PAC both support the allotment of Channel 300A to Port Matilda. In withdrawing his interest in use of the channel at Petersburg, Michael states that Port Matilda is the larger of the two communities and that a station there would most likely serve a larger population. No other party expressed an interest in the use of the channel at Petersburg. Therefore, no further consideration will be given to the allotment of Channel 300A to Petersburg.

3. We believe the public interest would be served by allotting Channel 300A to Port Matilda, Pennsylvania, since an interest has been expressed in providing the community with its first local FM service. Channel 300A can be allotted to Port Matilda in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.2 kilometers (1.4 miles) southwest to avoid a short-spacing to Station WGBE, Channel 300A, Williamsport, Pennsylvania.[1] Canadian concurrence has been received since Port Matilda is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Port Matilda, Pennsylvania	300A

5. The window period for filing applications will open on **April 10, 1990,** and close on **May 10, 1990.**

6. IT IS FURTHER ORDERED, That the petition of Victor A. Michael to allot Channel 300A to Petersburg, Pennsylvania, IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-46-58 and West Latitude 78-04-22. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR Section 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

ACHERNAR BROADCASTING COMPANY	File No. BPCT-860410KP
LINDSAY TELEVISION, INC.	File No. BPCT-860410KQ

For Construction Permit
for a New Television Station
Charlottesville, Virginia

Appearances

Margot Polivy, on behalf of Achernar Broadcasting Company; *Gene A. Bechtel*, on behalf of Lindsay Television, Inc.; *Christopher J. Reynolds* and *Audrey L. Allison*, on behalf of National Radio Astronomy Observatory; and *Larry A. Miller*, on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: February 12, 1990; Released: February 22, 1990

PRELIMINARY STATEMENT

1. This proceeding is before the Presiding Judge for the second time. On the first round, the Presiding Judge issued an Initial Decision in which he denied the application of Achernar Broadcasting Company (Achernar) under the Quiet Zone issue specified against it because "the evidence is overwhelming that a grant of Achernar's application will result in objectionable interference to the NRAO's operations in Green Bank . . . ." 3 FCC Rcd. 5421, 5431 (1988). The Initial Decision also denied the application of Evangel Communications, Inc. (Evangel)[1] and granted the application of Lindsay Television, Inc. (Lindsay).

2. Achernar filed exceptions to the *ID* seeking, *inter alia*, reversal of its disqualification on the "Quiet Zone" issue. In its exceptions, Achernar argued that a grant of the Lindsay application would cause an equal amount of interference to the Quiet Zone as would a grant of its application, thus rendering Channel 64 equally unusable to NRAO. In support of this contention, Achernar relied on its Exhibit 6, prepared by its consulting engineer, John J. Mullaney. Exhibit 6 was received in the prior hearing as an offer of proof. By *Order*, 4 FCC Rcd 829 (Rev. Bd. 1989), the Review Board sought comments from all of the parties, including the Bureau, "with respect to the accuracy of Achernar Exhibit 6 and to Achernar's deductive representations that purportedly derive therefrom."

3. On April 17, 1989, the Review Board released its *Memorandum Opinion and Order*, 4 FCC Rcd 3629 (*Reward Order*), and remanded the case to the Presiding Judge on the following issue:

> To determine whether the electrical interference to be caused by Achernar, or Lindsay, or both would render Channel 64 equally unusable to NRAO for its radio astronomy purposes.

Remand Order, 4 FCC Rcd at 3631. The Review Board stated that its concern "is to avoid an anomalous public interest result which could obtain if, in fact, the detrimental impact on the Quiet Zone, which it is the Commission's policy to minimize, would be effectively the same no matter which application is granted in this proceeding: *viz.*, the practical elimination of Channel 64 as a usable radio astronomy frequency." *Remand Order*, 4 FCC Rcd at 3630.

4. Prehearing conferences were held on April 25 and May 16, 1989. On July 17, 1989, a hearing session was conducted under the remanded issue and testimony was taken from four witnesses, John J. Mullaney on behalf of Achernar, and Drs. J. Richard Fisher, George A. Seielstad and Robert L. Brown on behalf of NRAO. The record was closed on July 17, 1989 (Tr. 1492). Proposed findings of fact and conclusions of law were filed on September 8, 1989; replies were filed on September 22, 1989.

FINDINGS OF FACT

5. Achernar presented the written testimony of John J. Mullaney, its consulting engineer, together with his work notes concerning his computations of the potential for interference to the NRAO in the West Virginia "Quiet Zone" by operations on TV Channel 64 as proposed by Achernar and Lindsay. Achernar Exhibit Nos. 1R and 2R. Achernar Exhibit No. 2R consists of Mr. Mullaney's work notes which contain a computerized evaluation of the terrain along a direct path to the NRAO facility from the site proposed by each applicant. This information was used to determine the extent that terrain obstructions (mountains) would attenuate or reduce the theoretical signal of each applicant. Achernar Exhibit No. 1R, p. 5.

6. This terrain information was used as input information to another computer program called "Optics." The Optics computer program was developed for Mullaney Engineering in the mid 1970's. The Mullaney program is based upon Tech Note 101, which is a series of mathematical computations that considers the "Transmission Loss Predictions for Tropospheric Communications Circuits." Tech Note 101 was authored by P. L. Rice, A.G. Longley, K.A. Norton and A. P. Barsis of the Institute for Telecommunications Sciences and Aeronomy (formerly part of the National Bureau of Standards). *Id.*

7. The Optics computer program provides its answers in terms of micro-volts or dB above one micro-volt (dBu). The protection criteria used by the NRAO are specified as power density in units of Watts per Square Meter and are specified with respect to reception at the NRAO facility at

Green Bank. TV Channel 64 operates between 770 and 776 MHz and is therefore subject to an NRAO limitation of not creating more than 1×10^{-17} W/m^2. *Id.* at p. 6.

8. The following is a summary of the received signal strengths generated by each applicant, based upon the Optics computer program, and the amount each of the applicants exceeded NRAO's power density limits for the Quiet Zone:

Applicant	Signal Strength W/ (Sq. Meter)	Amount Over dB	Quiet Zone Limit Times
Achernar	6.494×10^{-13}	48.13	65,013
Lindsay	2.285×10^{-13}	43.59	22,856

Id.

9. Achernar's application proposed to utilize a transmitter site within the Quiet Zone and will operate with an antenna height above sea level of 2025 feet and with 3182 kW of power input to the antenna. Achernar Exhibit 2R at p. 3. Lindsay's application proposes to utilize a transmitter site outside the Quiet Zone and will operate with an antenna height above sea level of 1224 feet and with 5000 kW of power input to the antenna. *Id.* at p. 11. Lindsay's proposed transmitter site is 0.73 miles closer to the NRAO facility at Green Bank, West Virginia and the Lindsay application proposes an Effective Radiated Power (ERP) 1.96 dB higher than that proposed by Achernar. Achernar Exhibit No. 1R at p. 5.

10. Dr. J. Richard Fisher, NRAO's technical expert, reviewed Mr. Mullaney's calculations contained in Achernar Exhibits 1R and 2R regarding the extent of interference which would be caused to NRAO's radio telescopes located in Green Bank, West Virginia. For purposes of this proceeding, he accepted Mr. Mullaney's calculations as true. Based upon Mr. Mullaney's calculation that the power density level of Lindsay Television's signal would be 2.3×10^{-17} w/m^2, exceeding the National Radio Quiet Zone power density limits by a multiplication factor of 20,000, Dr. Fisher concludes that Lindsay Television's signal would render the frequencies 770 to 776 MHz unusable to NRAO and thus would cause harmful interference to NRAO's Green Bank facilities. NRAO Exhibit No. 1R, p. 1; Tr. 1429. Dr. Fisher also determined that Achernar's proposal would cause harmful interference to NRAO's Green Bank facilities. NRAO Exhibit No. 2, p. 8; Tr. 1431.

11. Dr. Fisher's determination is based both upon Mr. Mullaney's calculations and upon the sensitivity of NRAO's radio astronomy receiver as well as his experience. If the range of this magnitude of interference was on a very narrow band of frequency, 10 KHz or smaller, NRAO's filtering and observation techniques would permit it to recover approximately 80 percent of the 770-776 MHz band. However, because the Lindsay signal to be generated will use the entire six megahertz, not only are these six megahertz lost, but Dr. Fisher estimates that an additional two megahertz, one on each side of the 770-776 MHz band, may be lost as well. Because Achernar's interfering signal would be approximately three times stronger, in addition to the six megahertz, four megahertz, two on each side of the 770-776 MHz bank, would be lost. NRAO Exhibit No. 1R, pp. 1-2; Tr. 1415, 1418, 1426-1427.

12. According to Dr. Fisher, the intensity levels of Lindsay's and Achernar's signals are each of such magnitude that the only way to enable the NRAO to use the frequencies of 770-776 MHz, as a possible alternative to denying both applications, would be turn off the transmission of Lindsay's or Achernar's signal completely, assuming that the radiated power in the direction of Green Bank cannot be reduced substantially. NRAO Exhibit No. 1R, p. 2; Tr. 1366-1368, 1421-1422, 1424-1425.

13. Dr. George A. Seielstad, the Assistant Director of NRAO and head of its Green Bank facilities, testified that the NRAO presently operates three major telescope systems at its Green Bank, West Virginia site. The first, a 140-foot diameter radio telescope, is used annally by about 250 scientists from 65 institutions. It is instrumented to receive cosmic signals at nearly all frequencies between 25 MHz and 25 GHz. NRAO Exhibit No. 2R, p. 1.

14. A second system is an 85-foot diameter telescope, the data from which is combined with those from three other telescopes (in Florida, Hawaii and Alaska) to facilitate the Naval Observatory's timekeeping function. This telescope operates at frequencies of 2.3 and 8.4. GHz for this, its primary purpose. When not in use for time determination, this 85-foot telescope monitors radiation from pulsars at frequencies of 327 and 610 MHz. The pulsar research is conducted by scientists from Princeton University. *Id.*; Tr. 1345, 1397.

15. The third system consists of two 85-foot diameter antennas united by fiber optic cables into a single telescope called an interferometer. Its frequencies of operation are being changed to 2.3 and 8.4 GHz. This interferometer monitors the changing signals from a hundred or so fluctuating radio sources. The data are used by scientists from the Naval Observatory and from the Naval Research Laboratory. NRAO Exhibit No. 2R, p. 2. Although the second and third system do not use receivers on frequencies in the UHF spectrum, Dr. Seielstad would no preclude such use in the future. Tr. 1348, 1389-1390.

16. All three systems are in use a very high percentage of every year. Typical percentages for the 140-foot telescope are: astronomical observations, 83% of all the available hours in a year; equipment maintenance, installation and upgrading, 12%; and time lost to equipment failure, inclement weather and radio-frequency interference, 5%. The other two systems operate an even higher fraction of the year because the instruments they utilize are changed less often. Accordingly, there is virtually no time during the year when man-made radio-frequency interference would not detract from or prevent useful astronomical measurements. NRAO Exhibit No. 2R, p. 2. Although none of the frequencies are used 100% of the time, including 770-776 MHz, a higher percentage of use cannot be precluded in the future should some scientific discovery be made. Tr. 1352, 1363-1365.

17. Dr. Seielstad provided data which showed that the antenna covering the frequency range of 750 to 1000 MHz for both the 140-foot and 300-foot telescope was used slightly over 20 days during the calendar year 1988 by approximately 10 persons. NRAO Exhibit 4R; Tr. 1358-1359, 1407-1409. The average use since 1986, when the Achernar and Lindsay applications were filed, was slightly less than 20 days per year.[2] Dr. Seielstad testified that because that frequency range was not used for the

other 345 days of the year does not mean that that particular antenna is unimportant or insignificant compared to other antennae used more frequently.

> For one thing, if you're lucky in science, you can make a discovery in an hour that has more significance than a career someone spends doing something else. The quality and quantity just don't straightforwardly equate, and the nature of research is you're into this unknown and you're always exploring unknown things. Tr. 1388-1389. *See* also Tr. 1390-1391.

18. Until November 15, 1988, NRAO operated its 300-foot diameter radio telescope. On that date, the telescope, which had been in use since late 1962, collapsed completely. This telescope was one of the most powerful in the world. It was the largest single telescope in the U.S. with the capability to survey the whole northern sky. Over the last 25 years more than a thousand astronomers from U.S. universities used it to study quasars, galaxies, pulsars, stars, the Sun and planets. 250 students were trained in observational radio astronomy on the telescope and 53 Ph.D. theses were awarded to students for research done wholly or partly with this telescope. The most complete and detailed surveys of cosmic radio sources available to astronomers were made by the telescope. It was used in the discovery of the rapidly pulsating radio source in the Crab Nebula, the remnant of the star which exploded to create the spectacular nebula, that unlocked the puzzle of the pulsars. NRAO Exhibit No. 2R, pp. 2-3; Tr. 1346, 1356-1357.

19. The combination of the enormous collecting area provided by the telescope and low-noise 21 cm receivers made it possible for astronomers in the 1960's to detect the gaseous envelopes of galaxies in the vicinity of the Milky Way. Observations which led to the conclusion that most of a galaxy's mass is invisible and those which led to the development of the tool for measuring the distances to galaxies were performed on the 300-foot telescope. Thus, the loss of this telescope left a major gap in the capability for scientists to study the cosmos. Among the projects which had been scheduled to use the 300-foot telescope was one to monitor 100 of the brightest pulsars in collaboration with NASA's Gamma Ray Observatory scheduled for shuttle launch in 1990. The need to replace the telescope with a modern, large, filled-aperature radio telescope in support of a wide variety of astronomical research programs was self-evident. NRAO Exhibit No. 2R, pp. 3-4.

20. To that end, almost immediately after the collapse, plans to replace the telescope with an even larger, more sensitive radio telescope, were initiated. Meetings to discuss the telescope and its funding were held beginning in November 1988 with Senators Robert C. Byrd and John D. Rockefeller and representatives of the National Science Foundation (NSF), Associated Universities, Inc. (AUI) and the NRAO. A workshop to define the scientific goals for a new telescope was held in Green Bank in December 1988. 58 scientists representing various institutions attended the workshop and the proceedings were submitted to the NSF. An internal NRAO Technical Study Group reported major telescope design considerations to the NSF in February 1989. In April 1989, the NRAO prepared a Long Range Plan for 1990-1994 for submission to the NSF. Included in that plan is a proposal for the "[c]onstruction of a high performance, fully steerable, large aperture radio telescope in Green Bank. The telescope design will offer major advances over existing instruments in every relevant area of research." Also in April, the NSF's Advisory Committee for Astronomical Sciences strongly recommended the construction of a modern replacement telescope in Green Bank. *Id.*, pp. 4-5.

21. On June 15 and 16, 1989, the U.S. Congress passed supplemental appropriations legislation which authorized the expenditure of $75 million for the construction of a new telescope in Green Bank. President Bush signed the legislation on June 30, 1989. An earlier congressional committee report noted that "[t]he current location for the telescope is the only designated radio quiet zone in the world and the site of a multi-Federal agency radio astronomy user network. As a result, it is the only site which could be used for a replacement telescope without substantial scientific risks and increased reconstruction costs." *Id.*, p. 5; Tr. 1346, 1349-1350.

22. At present, NRAO foresees the detailed design work for the new telescope will be completed in 1990, the fabrication and erection of the telescope during 1991-1994, and commencement of the operation of the new facility in late 1994. The frequency range will include 100 MHz to 50 to 100 GHz. Tr. 1351. Because the life expectancy of the new telescope is anticipated to be 30 to 50 years, and because other important plans are being developed to improve the NRAO in Green Bank as it heads into the next century, the protection against interference afforded by the National Radio Quiet Zone continues to be of crucial importance. NRAO Exhibit No. 2R, pp. 5-6.

23. Dr. Robert L. Brown, the Associate Director for the NRAO in Charlottesville, Virginia, testified that in addition to his administrative duties, he is actively engaged in radio astronomy observations for his own research. The common general theme of his studies is the formation of active galactic nuclei. He testified that our Milky Way Galaxy is a flattened disk of stars, gas and dust swirling about a central point nearly 25,000 light years from the earth. The sun is but one of 100 billion stars that make up the galaxy and the sun is among the younger stars--it is only approximately 5.5 billion years old. The oldest stars in the Milky Way have ages approaching 12 billion years, but even these extremely old stars are themselves young compared to the age of the universe, approximately 18 billion years. Astronomers seeking to understand the evolution of the universe can study stars in the Milky Way to address many questions regarding the most recent two-thirds of the evolutionary history of the cosmos. To understand events occurring even earlier, more distant galaxies well outside the Milky Way must be observed. NRAO Exhibit No. 3R, p. 2.

24. The central achievement of twentieth century astronomy, recognition of the expansion of the universe, has the corollaries that the universe indeed had an origin in time and that the distance between any two galaxies increases as time progresses and the universe grows larger. Furthermore, it is known that the velocity of separation between two galaxies is proportional to their distance from one another. This is known as Hubble's Law. Since the light, or radio waves, from distant galaxies takes a finite time to reach the earth, the light observed today was emitted from galaxies when they were younger; the most distant galaxies are now seen as they appeared in their

earliest stages of formation. Thus, by observing distant galaxies the astronomer can directly study galaxies as they were forming in the first few billion years of the universe. *Id.*, pp. 2-3.

25. One of the most startling discoveries in radio astronomy was that there is more to a galaxy than what can be viewed optically. Optical pictures of a galaxy depict a lot of stars and gas and dust circling a central point. By means of a radio telescope, the same galaxy can be seen as being surrounded by enormous lobes of radio emission, which are more energetic than the galaxy as a whole. In the quest to determine the source of the radio emissions, recent observations suggest that the energy appears to flow from the center of the galaxy out into the radio lobes. This transformation of energy from starlight into electrons which radiate at radio frequencies, is not a one-time phenomenon but rather energy continuously flows from the nucleus out to the radio lobes. What is observed with a radio telescope are relativistic electrons slowing down, cooling off, and giving up energy. With a higher resolution it can be seen that the source of the energy is extremely compact. This phenomenon discovered by radio astronomers, that a small source of energy was producing energy larger than one hundred billion or a thousand billion stars, led to the theory of the existence of black holes. *Id.*, pp. 3-4.

26. It is this process that has been the subject of Dr. Brown's own research. One aspect of his research has been to observe the radio sources individually in an attempt to determine their structure, their size and extent, the amount of energy they produce and how long they have existed. A second aspect of his research is to study the center of our own galaxy to determine whether there is a black hole there too. His own postulation is that there is a very compact radio source there, highly energetic, but fortunately for the human race, not as energetic as those in other galaxies. Because the shape of our galaxy is not a uniform sphere, but rather the outer edges are diffuse, it is Dr. Brown's theory that the radio source in the Milky Way was at one time highly energetic. If that theory is correct then perhaps every galaxy at one time or other was a bright radio galaxy. The fact that not all galaxies today are bright radio sources suggest that these galaxies are evolving. *Id.*, pp. 4-5.

27. These pieces of evidence are but a few of the pieces of evidence discovered by twentieth century astronomy which suggest the evolution of galaxies, that an object which can be seen today was not the object which was a bright radio source before and indeed may not have been in existence. The current thinking in astronomy is that only about ten percent of existing matter can be seen; astronomers have no idea what constitutes the remaining 90 percent. *Id.*, p. 5.

28. Knowing what our own galaxy looks like now, the radio telescope permits examination of the universe out to enormous distances. Doing so also permits the radio astronomer to look back in time because the light from these objects has taken a long time to travel a great distance. In fact, the light from the most distant objects was emitted at a time when our own galaxy did not exist. Therefore, the questions "Do galaxies look the same everywhere in the universe?" and "Are the very distant galaxies the same as the Milky Way or are they different?" really pose the question "Did they change in time?" *Id.*

29. Another important question being asked is "Where do galaxies come from?" To answer "From gas and dust and stars" does not answer the question. Astronomers know how gas and dust and stars form in the Milky Way. If the galaxy itself is a great collection of gas and dust, on occasion there is a perturbation, a local density enhancement where gas collects and contracts under its own self gravity. Each of the individual particles pulls itself together and the collection tends to collapse centrally to form a star. Perhaps galaxies form the same way. Great clusters of gas and dust out in the intergalactic medium are swept up by a shock wave, an explosion, a very energetic quasar, or something, and are pushed together in such a manner that the material collapses under its own self gravity. *Id.*, pp. 5-6.

30. According to Dr. Brown, that hypothesis does not fully answer the question about where galaxies come from, because we do not know about the object which pushed the matter together. The "big bang" theory tells us that the universe had an origin in time and in space. Space and time each had an origin, and then matter was distributed in some great explosion. But that is not a full explanation of the development of the universe because explosions tend to distribute the matter uniformly. The question then about how local condensations are formed from which galaxies themselves are formed, is an important question and one which may not be answered by twentieth century science. *Id.*, p. 6.

31. There are two theories about the origin of galaxies. One is that initially there were a number of condensation points around which galaxies could form and those points were distributed in space whereupon individual galaxies then nucleated out in each of these condensation points. The galaxies we see today, the quasars we see at a great distance, perhaps all come from such nucleation point distributed uniformly throughout the universe. *Id.*, p. 7.

32. Another theory is that bubbles formed in the early universe and expanded more rapidly than their surroundings, just as soap bubbles expand in a dishpan, creating an environment where galaxies can form. These two theories, crudely formulated, make quite different predictions. In the first, galaxies are uniformly distributed and should be the same everywhere. The second suggests that galaxies ought to be put in shells or filaments, each of which could be different. By looking at distant galaxies back in time, the fundamental questions about their formation might be answered. These questions are those that Dr. Brown has been trying to address in his own research. *Id.*

33. For his own work, Dr. Brown uses the Green Bank telescopes, both the 300-foot telescope prior to its collapse and the 140-foot telescope, the Very Large Array (VLA) telescope NRAO operates in New Mexico, and to a lesser extent, the Kitt Peak telescope. The Kitt Peak telescope is a millimeter wave telescope built on top of a mountain and designed with a very precise surface for operation from 90 to 350 gigahertz to study light molecules. He uses that telescope to search for red-shifted molecular emmissions from distant galaxies. Red-shift is equivalent to Doppler shift and operates to shift frequencies of interest generated by galaxies that are moving away from us to lower bands covered by the Kitt Peak telescope. Dr. Brown has studied the ionized gas in the nucleus of the Milky Way as well as millimeter waves on that telescope. *Id.*, pp. 7-8; Tr. 1436, 1444-1445.

34. The VLA telescope in Socorro, New Mexico is an array of 27 antennas, 25-meters in size, in a configuration shaped like the letter "Y". Each arm of the "Y" is about 15 miles long and the nine antennas on each arm are transportable along those arms. This telescope is used for high resolution work and utilizes eight separate narrow band receivers from 22 gigahertz to 75 megahertz. The telescope also utilizes receivers for portions of the K, KU, C, L and P bands in addition to low frequency receivers at a fixed frequency near 75 megahertz. NRAO Exhibit No. 3R, p. 8.

35. As for the Green Bank telescopes, the 300-foot and the 140-foot telescopes are quite different instruments. The 300-foot telescope was unmatched anywhere in the world. It was a transit telescope, not steerable, which could be rotated and pointed at a given declination or a different set of sources to observe hundreds or thousands of objects in a single day, which objects could be reviewed the next day to see how they changed. The 140-foot telescope on the other hand is a precise steerable instrument which has the ability to track sources over a long period of time. The telescope will point from horizon to horizon and it is equipped with a superb set of receivers which cover the frequency bands almost continuously from 25 megahertz to 26 gigahertz. There is no other telescope in the world which comes close to having that capability. *Id.*, pp. 8-9.

36. Dr. Brown has used both of the Green Bank telescopes, principally the 140-foot instrument, to survey the frequency spectrum 1420 megahertz and below looking for red-shifted hydrogen clouds. This 1420 MHz spectral line of neutral atomic hydrogen is used to investigate the mass, temperature and motion of the gas from which galaxies form. As the galaxy being observed at great distances and far back in time moves away from the Milky Way, the spectral signature of the galaxy shifts in frequency--the Doppler effect or the red- shift. The frequency of the hydrogen line received at the earth depends on the velocity of the galaxy relative to the earth and through Hubble's Law, on the distance to that galaxy. The greater the distance, the greater the velocity and the lower in frequency the hydrogen line is received. Also, the greater the distance, the earlier in its evolutionary history the galaxy is seen. If an astronmer can place a galaxy in three dimensional space--where it is on the sky and where it is relative to the earth as the observation reaches back into time and space--the question of how galaxies form--are they in threads or filaments or are they the same everywhere--can be answered. *Id.*, pp. 9-10; Tr. 1444-1445.

37. In the last decade the hydrogen spectral line in distant, evolving galaxies has been observed from 1420 MHz to frequencies as low as 400 MHz. The very young galaxies are still condensing gas clouds with few or no stars yet formed. As such, they emit no visible light; their identification is possible only through their radio spectral line emission. Thus, the only direct means of observing the earliest stages of galaxy formation is by the techniques utilized by radio astronomers as outlined above. NRAO Exhibit No. 3R, p. 10.

38. Dr. Brown's own research has concentrated on the frequency range from 500 MHz to 1420 MHz because that seems to be where new galaxies are formed from enormous gas rich objects to star rich objects. This 21 centimeter line (1400 to 1427 MHz) red-shifted down can tell the observer where they are, how massive they are and how turbulent is the region out of which they form. That frequency range seems to give Dr. Brown the essence of the formation process of galaxies. *Id.*, pp. 10-11; Tr. 1444-1446.

39. In the last year, Dr. Brown has been concentrating on the frequency range of about 700 to about 990 MHz, and especially 750 to 830 MHz. Tr. 1435-1437, 1442. The reason for that is threefold. First, the receiver that NRAO has for that range is much better than it used to be. Tr. 1445. The amplifiers in that receiver have been replaced by so-called high electron mobility transistor amplifiers which are low noise mechanisms that greatly increase sensitivity. One can now probe deeper into space and see signals more clearly. Second, the interference environment has been exceptionally good at those frequencies, particularly 750 to 830 MHz. There are some exceptions such as around 900 MHz where interference is caused by passing aircraft telephones. Third, his own research has progressed to the point that he believes with the Doppler shift down to the 750 to 830 MHz frequency range, gas rich galaxies are being formed. That range seems to be where the science is. NRAO Exhibit No. 3R, p. 11; Tr. 1444-1446.

40. One of the serious problems about the 500 to 1420 MHz band of frequencies is that, with a few small exceptions which Dr. Brown already noted, it is subject to interference, severe at times, from a number of different sources. These sources include household appliances, industrial noise, automobiles, aircraft and satellites. Also included are FM broadcast stations and UHF television signals in portions of that band, some of which at times are so strong that one cannot observe at certain frequencies because the interference is overwhelming. *Id.*, pp. 11-12; Tr. 1448, 1453-1455, 1457, 1459.

41. Some of the interference is constant and some of it is intermittent. The intermittent or transient interference can be addressed. For example, if an airplane using navigational radar flies over the telescope, rendering the telescope unusable on a particular frequency or frequencies, after the airplane has flown beyond the horizon in a few minutes, radio astronomy observations can be resumed. NRAO staff members work with the community to repair or modify such things as electric fences, tractor engines, television set preamplifiers and the like, sometimes at NRAO's own expense. Tr. 1456-1457. The sources of constant interference are more difficult to address. For example, there is an aircraft radar at an airport near Green Bank which operates at about 1200 or 1250 MHz. There is nothing that can be done except to avoid that frequency altogether. Over the period of time Dr. Brown has been using the Green Bank telescopes, he has accumulated a list of frequencies that are either unusable or that have been unusable from time to time. These include those for UHF Channels 50, 51, 59, 61, 63, 66, 67 and sometimes, even Channel 64. NRAO Exhibit No. 3R, p. 12; Tr. 1447-1449, 1451-1455; NRAO Exhibit No. 5R; Tr. 1467-1490.

42. When a frequency is unusable, NRAO can usually determine the source of interference. Tr. 1457. Broadcast station interference is probably the greatest source of interference and the source can usually be identified from a table of stations and frequencies. Usually the stations are near the Quiet Zone but Dr. Brown has thrown out experiments due to interference from a station located in Florida. Tr. 1462. Occasionally, after NRAO's inquiry, the broadcast station will inform it that its carrier frequency will be turned off late in the day--a particular public

station in Pennsylvania told NRAO it turns off its carrier at midnight--and so NRAO can work with that frequency on a very limited basis. Tr. 1457. Many stations leave their carrier on 24 hours a day. Tr. 1458, 1460, 1462-1464. The time spent identifying the source of broadcast interference, and the intermittent ability to use a particular broadcast frequency only after midnight greatly reduces the amount of telescope time to conduct research and has the effect of extending the duration of a research project beyond what it would otherwise be. Dr. Brown spends a considerable amount of his telescope time trying to determine whether the sources of interference are transient or constant, trying to identify the source and trying to reach accommodation with the transient sources as to transmission time, frequency and other kinds of adjustments. Tr. 1484-1486. In his research, interference renders a frequency unusable to Dr. Brown when the antenna temperature in that single channel of the autocorrelator exceeds one one-hundredth of one degree Kelvin. Many times, he and his colleagues are forced to scrap large quantities of data because of the interference. NRAO Exhibit No. 3R, pp. 13-14.

43. Interference disrupts Dr. Brown's research if he does not have the full frequency range available for observations, because he cannot determine whether galaxies are distributed uniformly or whether they are distributed in filaments and clumps. If he is mapping a continuous object and he runs into a boundary caused by broadcast interference, the object looks discontinuous to him. It is similar to taking a straight line and breaking it up into a dashed line and asking whether the line was dashed to begin with or whether it was a straight line that was interrupted. Loss of use of the particular frequency band of 770 to 776 MHz would be especially harmful to his research because he does not know how the galaxies are distributed in that volume of space observable on that band. *Id.*, p. 14.

44. Despite the problems with interference the Green Bank facilities are the best in the world for conducting radio astronomy research because of the protection from noise afforded by the Quiet Zone. There are other telescopes around the world, but Dr. Brown's international colleagues have trouble even observing on frequencies reserved exclusively for radio astronomy use because of the local environment. For example, Germany has a superb hundred meter fully steerable telescope; nevertheless, German radio astronomers come to Green Bank to do their research because of the great extent of interference due to NATO. The Green Bank telescopes have come to be the only place in the world where research such as Dr. Brown's can be conducted. *Id.*, pp. 14-15; Tr. 1377-1378, 1385-1386.

45. Dr. Brown is personally aware of two other research programs being conducted at the Green Bank facilities over the frequencies of 750 to 1000 MHz. One is led by Joe Taylor at Princeton and the other by Don Backer at the University of California at Berkeley. They conduct pulsar searches and use a wide spectral band which includes the 770 to 777 MHz frequencies. Dr. Brown also knows of several groups that are conducting research similar to his and who are working in the 770 to 990 MHz frequency band. The most active group is led by Dr. Art Wolf at the University of Pittsburgh. NRAO Exhibit No. 3R, p. 15; Tr. 1434-1435.

46. NRAO witnesses were cross-examined about the feasibility of turning off the transmitter for Channel 64 in the event that both the applications of Achernar and Lindsay were not denied. Presumably, this alternative might permit NRAO to conduct its research and permit either Achernar or Lindsay to operate the Channel 64 television facility when NRAO was not using the 750-1000 MHz antenna. Dr. Seielstad, the Green Bank site director, stated that this alternative would cause some interference on 770-776 MHz to disappear. Tr. 1366-1368.

47. However, that alternative is not a panacea for all interference. A significant amount of time is spent by researchers determining the source of interference, and determining whether the source can be eliminated. Tr. 1374. This fact was confirmed by Dr. Brown. Tr. 1484-1486. The occurrence of unanticipated spectacular phenomena such as comets and super nova would make sufficient advance notice to either Achernar or Lindsay difficult. Tr. 1363. Likewise, the extent of usage for the 750-1000 MHz receiver on NRAO's telescopes cannot be predicted with any degree of accuracy for the future, no more so than it would have been when the telescopes were first constructed. For example, the existence of quasars was not known then. Tr. 1364, 1388-1391.

48. The experience of NRAO in dealing with broadcast sources has been mixed. Assuming the broadcast station can be identified, the station is contacted to determine whether the transmitter can be shut off. Sometimes it can be and sometimes it cannot. Sometimes the NRAO doesn't even bother to inquire. Tr. 1399-1400. As Dr. Brown testified, the inability to eliminate this kind of interference has resulted in scrapping parts or all of the project. Tr. 1460-1464; NRAO Exhibit No. 3R, p. 14. On a larger scale, Dr. Seielstad stated that instituting such an alternative with respect to all broadcast applications "would be a very difficult operation to administer if every proposal had to be a subject of negotiations among several parties. Now I'm not saying its impossible." Tr. 1375. Dr. Fisher stated that such an alternative "makes life more difficult, scheduling more difficult . . . ." Tr. 1424.

CONCLUSIONS

49. The issue specified by the Review Board on remand is whether Achernar or Lindsay will cause interference to NRAO which would render Channel 64 unusable for radio astronomy purposes. It is concluded that both Achernar and Lindsay will render Channel 64 unusable by NRAO because of the interference each will generate. The Achernar and Lindsay proposals will each greatly exceed the amount of interference acceptable to NRAO at the Green Bank facility. Achernar will exceed the NRAO acceptable limit by 65.013 times while Lindsay will exceed the NRAO acceptable limit by 22.856 times. Both proposals will so exceed the NRAO limit that they will each render Channel 64 totally unusable for astronomical purposes during the time their respective transmitters are operating.

50. The only difference in the preclusive effect between the Achernar proposal and the Lindsay proposal involves two MHz of spectrum on either side of 770 to 776 MHz. Based on the experience of the NRAO staff, the Lindsay proposal would cause interference to the Green Bank facilities on approximately 769 MHz to 777 MHz and Achernar would cause interference on approximately 768-778 MHz. The spillover effect would occur because of

the large amount by which the Lindsay and Achernar proposals exceed the interference standards for NRAO. Achernar's signal would cause a greater range of interference because its signal at the Green Bank facilities would be three times stronger than Lindsay's. Both proposals would render Channel 64 unusable by NRAO.

51. The difference between the interference to NRAO caused by Achernar's proposal as opposed to Lindsay's proposal is not significant. Both proposals will render 770 MHz to 776 MHz unusable by NRAO. While Achernar would preclude the use of an additional 4 MHz of spectrum and Lindsay would preclude the use of only 2 additional MHz, this difference is not significant. What is significant is that either proposal would block out at least 8 MHz of spectrum from use by NRAO for astronomical purposes. Thus, the record establishes and it must be concluded that the electrical interference that would be cause by both Achernar and Lindsay would render Channel 64 unusable to NRAO for its radio astronomy purposes.

52. Having determined that both Lindsay and Achernar render the Channel 64 frequencies unusable to NRAO, it would appear that the Presiding Judge has discharged his responsibilities under the *Remand Order*. The issue, as framed in the *Remand Order*, does not call for the Presiding Judge to determine whether Lindsay's application should also be denied or whether Achernar's or Lindsay's applications should be granted subject to conditions. However, the *Remand Order* contains a footnote which would indicate that the Board was seeking a more expansive record and conclusions than indicated by the issue designated. Thus, the Board states:

> . . . "It is our purpose in remanding to consider 'all aspects' of the interference in this case, and to ascertain what action is 'appropriate' in the context of this unusual proceeding." *Remand Order*, 4 FCC Rcd 3629, n. 5.

In light of this language, the Presiding Judge considers, *infra*, the divergent solutions of the parties resulting from the conclusion that both Achernar and Lindsay render the Channel 64 frequencies unusable to NRAO.

53. Lindsay argues in its proposed conclusions that interference to the facilities of NRAO from an applicant located outside the Quiet Zone should not be considered by the Commission. Lindsay notes that NRAO has never objected to an application proposing a site located outside the Quiet Zone and that the Commission has never considered interference to NRAO by an applicant proposing such a site. Lindsay contends that consideration of its potential interference to NRAO facilities would engender "an unconscionable and unfair result," since Lindsay had endeavored to comply with the Commission's requirements by locating its antenna outside the Quiet Zone. Lindsay argues that consideration of its interference to the operation of NRAO would constitute a new policy and precedent for the Commission.

54. Lindsay's narrow view of the import of the Commission's establishment of the Quiet Zone is contrary to the public interest and cannot be accepted. As a practical matter, if NRAO does not object to the proposal of an applicant located outside the Quiet Zone (for policy or whatever reasons), the Commission would be unaware that the applicant's proposal would cause interference to the operation of NRAO in the Quiet Zone. If however, the Commission becomes aware of the potential interference to NRAO by an applicant located outside the Quiet Zone, as in this case, the Commission would be derelict in its duty to protect NRAO operations if it did not consider the proposed interference. Lindsay has cited no precedent where the Commission ignored proposed interference such as the record establishes that Lindsay will cause to NRAO. In fact, the instant proceeding, involving mutually exclusive applicants proposing sites within and without the Quiet Zone, both of which would preclude use of the requested frequency by NRAO, appears to be a case of first impression. Comparison of the potential interference to be caused by each of the two proposals, however, is consistent with the provisions of Section 73.1030(a) of the Commission's Rules which states that, when NRAO objects to proposed operations, "the FCC will consider all aspects of the problem and take whatever action is deemed appropriate." To ignore the potential interference from Lindsay would be to ignore a relevant aspect of the problem of interference to NRAO.

55. The Bureau concludes that the adverse resolution of the remand issue does not require disqualification of either Achernar or Lindsay, but that the license issued to the ultimate winner should be conditioned upon the requirement to cease broadcast operations between midnight and 6:00 AM upon 30 days notice from NRAO. Bureau Conclusions at para. 28. Achernar proposes only that the NRAO and the licensee "reach a reasonable accommodation. Should such voluntary resolution, permitting reasonable usage by NRAO upon reasonable notice--a cooperation which the rule itself adjures--prove elusive, either NRAO or the licensee could request a more formal resolution from the Commission, based upon actual facts and experiences." Achernar Conclusions at para. 7.[3] However, Achernar has indicated in its Reply (page 4) that it has no objection to the conditional grant suggested by the Bureau and would accept such a condition if the Commission determines that it is appropriate.

56. Achernar and the Bureau cite evidence concerning the amount of use of the 750-1000 MHz telescope receiver as justification for requiring NRAO to share the frequency with the winner of this proceeding. Achernar Findings at paras. 5-8 and Conclusions at paras. 3-4; Bureau Findings at para. 18 and Conclusions at para. 15. However, they overlook the record evidence that renders the extent of usage a meaningless measuring stick. Dr. George Seielstad, director of NRAO's Green Bank operations, testified that "[t]he quality and quantity just don't straightforwardly equate . . . ." Typically, an initial scientific exploration may lead to an immediate discovery followed by years of additional work. Some of the most significant discoveries made in the science of radio astronomy were initial forays into unknown territory. "It wasn't the length of time that went into it; it was sort of the newness of the discovery. So it's very [hard] to say if someone worked six days and produced a result, it can't be as good as someone who has worked on it year after year after year. That just does not follow." (Tr. 1389).

57. Another reason that quantity is not a valid basis for requiring the shared use of Channel 64 frequencies is simply that past usage is no reliable indicator of future use. Dr. Seielstad cited the unpredictability of future use of any particular telescope receiver as contributing to his inability to "judge from what its usage is right this minute to what its use will be forever." Tr. 1390. *See* also Tr.

1352. As an example, Dr. Seielstad referred to the time preceding the construction of the 140- and 300-foot telescopes, when "the science described would not match what we actually did, because of the telescope is at all successful, it discovers new phenomena. For example, when Dr. Brown testifies, he will be talking about observations in this band of the Channel 64 television channel involving quasars, and the existence of quasars was not known when the telescope was built." Tr. 1364.

58. Achernar asserts that "[o]ther than a single observation by Dr. Robert Brown in 1988, Tr. 1489, there is no evidence that the 770-776 frequencies have ever been used by the observers who observed in the 750-1000 MHz band." Findings at para. 6 and Conclusions at para. 3. Not only is that finding unsupported by the transcript citation, it entirely misses the point. NRAO Ex. 5R, at pp. 4 and 7, directly contradicts Achernar's findings because it shows observations on Channel 64 frequencies for two days in August, 1988. Tr. 1468-1469. Moreover, that exhibit is merely representative of Dr. Brown's work notes. Tr. 1470-1471, and in no way reflects the total number of times Dr. Brown or anyone else for that matter conducted studies precisely in the Channel 64 frequencies. In additional to the narrow frequency specific research of which NRAO Exhibit 5R is an example, the record evidence shows that other scientists conduct wide spectral band studies in the 750-1000 MHz range, including the Channel 64 frequencies. NRAO Ex. 3R, p. 15; Tr. 1434-1435. Regardless of the amount of usage of 770-776 MHz, it is in this spectral region that Dr. Brown is attempting to discover the origins of a galaxy and perhaps of our universe. Loss of use of the 770-776 MHz frequencies would be especially harmful to this research because he does not know how galaxies are distributed in that volume of space observable on that band. NRAO Ex. 3R, p. 14.

59. Drs. Seielstad and Fisher testified that turning off the Channel 64 transmitter by either Achernar or Lindsay would be "feasible." Tr. 1367-1368, 1375, 1395, 1421-1422, 1424. Achernar (Findings at para. 14 and Conclusions at para. 5) and the Bureau (Findings at para. 7) cite this testimony as evidence that shared use of the frequency will work. However, both ignore the testimony that this solution is impractical. *Id.* The record evidence demonstrates there are a number of valid reasons why turning off a TV transmitter during NRAO observations is inconsistent with optimal efficiency of NRAO operations.

60. Consistently and successfully in every instance but the instant one, the NRAO has coordinated with broadcasters to reduce power, directionalize, change transmitter sites, or in some other manner work with broadcasters to enable them to operate in the Quiet Zone in such a manner as to eliminate potential and actual interference. *See* Initial Decision at para. 48. Dr. Seielstad testified that the protections established for the Quiet Zone are only effective if they are applied uniformly. Tr. 1376-1378. Effectuating a shared frequency procedure for Achernar or Lindsay opens the door to identical accommodations for other broadcast applicants. This practice has far-reaching adverse consequences. The whittling away of the protection afforded the Quiet Zone would, over time, render it of little use for astronomical research.

61. In addition to the overall adverse consequences of instituting a shared frequency practice in the Quiet Zone generally, the record evidence demonstrates other reasons why such a practice is not feasible. An astronomer who encounters an interfering signal doesn't automatically know the source of interference. As noted by Dr. Seielstad, valuable research time is lost determining the source of the interference and attempting to eliminate it. Tr. 1374. Also, it would be a very difficult operation to administer if every proposal had to be the subject of negotiations among several parties, particularly where the scheduled time on the telescope is one week or less. Tr. 1486. Moreover, the Bureau's proposal requiring 30 days advance notice is impractical for another reason. An astronomer cannot always know in advance what frequencies he needs to conduct studies throughout his scheduled usage of the telescope because that may depend on what he discovers during his initial observations. Tr. 1362. In addition, rare astronomic events such as comets and supernova occur with little or no notice.

62. To limit NRAO's use to hours after midnight, as recommended by the Bureau, drastically reduces the available time to conduct radio astronomy research. Unlike optical astronomy in which the best viewing is in the evening, radio astronomers conduct telescope research 24 hours a day. Tr. 1357. To limit observations to a six-hour period is to reduce research time by 75% and the obvious effect is to greatly extend the amount of time needed to complete research. NRAO Ex. 3R, p. 13. Comets don't always appear after dark nor is there much advance notice of their arrival; limiting telescope time to after midnight might result in losing the opportunity to study a comet. Tr. 1394. In sum, the record evidence establishes that shared use of 770-776 MHz between NRAO and the winner of this proceeding would not make sense from the perspective of radio astronomy.

63. NRAO urges the Presiding Judge to deny both applicants. The Presiding Judge agrees. The public interest is better served by continuing to protect the radio astronomy activities at the NRAO facilities. The NRAO has provided ample evidence of the importance of the Quiet Zone. That evidene has been fully set forth in the Initial Decision and in these Supplemental Findings and Conclusions. On remand, the record has been supplemented with evidence that actual research projects are being conducted on and around the very frequencies for which Achernar and Lindsay have made application. These studies are directed at discovering the origin of galaxies, including our own Milky Way. Such studies are to continue for the foreseeable future. The public interest is clearly served by such fundamentally significant use of 770-776 MHz by NRAO. On the other hand, there is no evidence submitted by either Lindsay or Achernar which provides any basis for considering offsetting public interest benefits flowing from a grant of either application. Consideration of the gray area argument advanced by Achernar has already been fully considered and rejected. Accordingly, it is concluded that both Achernar and Lindsay must be disqualified under the remand issue and that their applications must be denied.[4]

Accordingly, That unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[5] the applications of Achernar Broadcasting Company and Lindsay Television, Inc. for a new television station at Charlottesville, Virginia ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Evangel did not file exceptions and its application has been dismissed. *See Order*, 4 FCC Rcd. 829 (Rev. Bd. 1989).

[2] The following data was compiled by NRAO (NRAO Ex. 4-R):

300 Foot Telescope
Observation at 750 to 100 MHz

Year	Days	Hours
1988 (thru Nov.)	11.46	275.00
1987	21.17	508.00
1986	17.58	422.00
1985	6.88	165.00
1984	12.21	293.00
1983	23.21	557.00
1982	14.92	358.00
1981	16.54	397.00
1980	17.67	424.00
1979	0.0	0.0
1978	12.13	291.00
Total	153.75	3690.00

140 Foot Telescope
Observation at 750 to 1000 MHz

Year	Days	Hours
1989 (thru June)	3.80	91.25
1988	8.63	207.00
1987	0.00	0.00
1986	0.00	0.00
1985	0.00	0.00
1984	10.31	247.50
1983	8.65	207.50
1982	0.00	0.00
1981	0.00	0.00
1980	0.88	21.00
1979	0.00	0.00
1978	0.00	0.00
1977	2.50	60.00
1976	0.00	0.00
1975	0.00	0.00
1974	2.99	71.75
1973	9.40	225.50
1972	0.00	0.00
Total	47.15	1131.50

[3] The Bureau, in its Reply disagrees with Achernar's proposal, urging that it would be more efficient to impose a condition from the time of first authorization. The Bureau states that under its proposal, the licensee will know what it is required to do and NRAO will know what it is entitled to in terms of channel availability. Otherwise, in the view of the Bureau, the potential exists that additional proceedings would be necessary in which the Commission would be required to act as arbiter. Bureau Reply at para. 6.

[4] *Assuming, arguendo*, it is determined there is an insufficient legal basis for disqualifying Lindsay, affirmance of the Presiding Judge's disqualification of Achernar under the Quiet Zone issue is, nevertheless, warranted. While not the optimal solution, the disqualification of Achernar, would serve the salutory purpose of preserving the sanctity of the Quiet Zone. Allowing Achernar to operate within the Quiet Zone in the manner proposed notwithstanding the justified opposition of the NRAO is unprecedented and could have far reaching adverse consequences and should not be permitted, regardless of the disposition of Lindsay's application.

[5] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-54[1]
Gen. Docket No. 80-113

In re

Amendment of Parts 21, 43, 74, 78, and 94
of the Commission's Rules, Pertaining to
Rules Governing Use of the
Frequencies in the 2.1 and 2.5 GHz Bands
Affecting:

Private Operational-Fixed Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution Service,
Instructional Television Fixed Service, and
Cable Television Relay Service

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: February 8, 1990; Released: February 22, 1990

By the Commission: Commissioner Quello issuing a separate statement.

1. We hereby propose to review and modify certain rules and policies that govern the various microwave radio channels, drawn from three separate services, that can be collectively utilized for the provision of "wireless cable." Wireless cable is a service which provides multiple channels of video entertainment and informational programming using a combination of old and relatively new over-the-air technologies. While the service resembles cable television service in the nature of the programming it provides and its multichannel character, it uses microwave radio channels, instead of coaxial cable, to deliver nonbroadcast material, such as HBO and ESPN, over the air into homes. It typically combines standard television broadcast reception equipment with special microwave reception equipment, and uses a combination downconverter and channel selector to provide a composite of broadcast and nonbroadcast signals to subscribers in a simple-to-use format.[2]

2. The frequencies specifically allocated for this use are those in the Multipoint Distribution Service ("MDS") and the Multichannel Multipoint Distribution Service ("MMDS").[3] In addition, there are channels in the Private Operational-Fixed Microwave Service ("OFS") which are suitable for and permitted for MDS-type service,[4] and the channels in the Instructional Television Fixed Service ("ITFS") can be leased for MDS-type use on a "part-time" basis (typically late afternoons, evenings, and weekends).[5] There are a total of thirteen channels available for MDS-type service on a full-time basis and twenty channels available on a part-time basis: two single-channel MDS channels (Channels 1 and 2 or, in some cases, Channels 1 and 2A[6], eight multichannel MDS channels (Channels E1-E4 and F1-F4), three OFS channels (Channels H1-H3), and twenty ITFS channels (Channels A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4).[7] The MDS channels are governed by Part 21, the OFS channels by Part 94, and the ITFS channels by Part 74 of our Rules. The combined use of these channels to provide a unified video entertainment service to the home will generally be referred to as "MDS service" in this document.

3. Certain fundamental considerations prompt us to undertake this proceeding. First, most of the rules at issue in this proceeding were established in the infancy of the various services they govern. They did not anticipate the marketplace changes fashioned by a rapidly evolving cable television industry, and they were not integrated in a way to fully exploit the potential of an MDS industry to compete in that marketplace if provided with adequate channel capacity, signal coverage and other capabilities. Instead, the rules in the various services were developed independently, focusing on the character and individual needs of the particular limited function originally anticipated for each service, with little consideration given to coordination among the services. Consequently, the rules and policies governing the spectrum assets that can be assembled and utilized by MDS operators not only contain possibly obsolete limitations, but also vary substantially from service to service. These restrictions and variations have adverse effects on MDS operators in terms of capability, convenience, and simplicity of use, and consequently on MDS's competitiveness in today's multichannel video marketplace, which is increasingly characterized by high capacity systems. The time has come, then, to review and to rationalize and simplify, where possible, the host of disparate technical, procedural, ownership, and other requirements and restrictions applicable to MDS operators, with a view to facilitating this service.

4. Further, because MDS offers the public a viable alternative to cable television service, it holds the potential to function as a competitive spur to coaxial cable system operators. We have elsewhere acknowledged the increasing importance of such competition and continue to believe that we should take all possible steps to encourage and facilitate competitive multichannel video delivery systems.[8] We note, however, that while MDS's competitive potential is, as yet, largely unrealized,[9] even the prospect of credible competition can have a salutary effect on existing service providers and thus redound to the benefit of the public.

5. Some of the proposals in this *Notice* involve the use of excess capacity on ITFS systems and the use of currently vacant ITFS channels for MDS service, as well as possible operational modifications affecting ITFS systems. Additional proposals affecting such uses may well be offered by commenters in this proceeding. Our desire to facilitate MDS service as a competitive multichannel source of programming for the public should not be taken as diminishing our continued belief in the critical importance of education, and the significant role that ITFS can play in providing improved educational opportunities for all. We do not intend to jeopardize the current or future ability of ITFS to fulfill its educational potential. In this regard, we continue to recognize that educational institutions may, for a variety of legitimate reasons, be slow to take advantage of all available resources, and that we must take great care not to foreclose

these resources. With this underlying note, we seek to provide as much access to and additional use of currently underutilized and vacant ITFS spectrum as possible.

PROPOSED RULE MAKING

6. In preliminarily reviewing the regulatory structure in which MDS service operates, we have identified a number of rules and procedures which appear to impede unnecessarily the effective delivery of that service. We propose here to consider a broad range of changes. We will first look to eliminating ownership restrictions which limit the number of MDS and OFS channels which can be licensed to a single entity. We will then consider changes in application processing procedures to expedite the authorization of new or improved service. We will next revisit our rules regarding power limitations and service areas, equipment performance, and other technical standards, in an effort to conform the rules in the various services to the extent possible, and to relate them to the currently recognized needs of the MDS service, thereby maximizing the service capabilities of MDS operators. Some of the proposed changes will affect the MDS industry as a whole. Others may directly affect only a discrete segment of the industry and the public, but may well have an indirect effect on all operators and their potential subscribers insofar as they enhance the stature and capabilities of the entire industry.

7. While a number of specific rule and policy modifications are proposed below, commenters are encouraged to suggest additional approaches or further changes which might advance our stated goals.[10] Also, we are particularly interested in comments from and about those MDS systems that are operating successfully at this time, including the number of channels and hours per channel and the power level(s) at which systems are operated, as well as any other relevant empirical evidence that can be offered. We are interested as well in any additional comments regarding the minimum number of channels necessary to market a video delivery system, and the marginal utility of additional channels beyond the suggested minimum, and any specific support, empirical or otherwise, that can be offered for these projections.

8. Some of the issues discussed below have already been addressed in conjunction with Rule Making proceedings for the OFS and MDS services. *Notice of Proposed Rule Making* in PR Docket No. 88-191 (" *OFS Notice* "), 3 FCC Rcd 3532 (1988); *Further Notice of Proposed Rule Making and Notice of Inquiry* in Gen. Docket No. 80-113 (*"MMDS Further Notice* "), 98 FCC2d 7 (1984). Comments which have already been filed in those proceedings will be incorporated and considered in this proceeding, where relevant to the issues raised herein. Those comments, however, may well not have considered specific concerns expressed herein, including the desirability of conforming interservice technical parameters and other requirements to the extent such conformance is useful and possible. Accordingly, the above-noted MDS and OFS proceedings, to the extent they remain unresolved, are hereby consolidated and subsumed in this proceeding;[11] commenters in both proceedings who wish to supplement their remarks in light of the matters addressed in this *Notice* are invited to do so. In this connection, parties are encouraged to reference previously filed comments, rather than reiterate previously advanced arguments, where possible.

INCREASING CHANNEL AVAILABILITY

9. A fundamental and critical element in the viability of any multiple channel subscription television service is the need to maximize the number of channels offered to subscribers by the system. While there are thirteen full-time and twenty part-time 2.1/2.5 GHz channels available for use in video delivery systems, there are a number of rules and policies which have the effect of preventing, impeding, or delaying an operator from assembling the largest possible number of channels for coordinated use in a commercial delivery system in a community or particular geographic area. Several of these rules and policies may have outlived their useful purpose or have proven over time to have been conservative in their application, and are now proposed for modification or elimination, as discussed below.

Ownership Restrictions:

10. Current Commission rules and policies prevent a single operator from acquiring a license for more than one OFS channel or more than one group of four MMDS channels in a market.[12] Although a single entity may operate additional channels in a market by leasing them from other entities, this practice is time-consuming and expensive, reduces operator control over service quality and improvements, and reduces the long-term certainty and stability of the operator's service, thereby discouraging both equity and debt investment. These disadvantages contrast sharply with the circumstances of MDS's closest current and potential competitors, coaxial cable television system operators and Direct Broadcast Satellite systems operators, each of which have complete control over their numerous channels of offerings.

11. The original purpose of the MMDS ownership restriction was to provide for competition between MDS programmers within each community.[13] The Commission's rationale for limiting OFS operators to one H channel in each community was to provide an equitable distribution of the limited number of channels among applicants.[14] In the *OFS Notice*, *supra* at 3535, we stated that it appears that the goal of distribution of H channels has served its intended purposes, as the three H channels have been assigned to different entities in almost all major markets. Furthermore, it now appears that efforts to promote competition via MDS channels are today more appropriately directed to advancing MDS as a single service to compete with other multichannel delivery systems in any market. Continued efforts to promote competition between MDS programmers now seem more likely to result in no MDS service at all, thus reducing interservice competition and ultimate service to the public.[15] Elimination of the ownership restriction for OFS licensees of the H channels has already been proposed in *OFS Notice*, *supra*, and consideration of that proposal will be included in this proceeding. We now also propose elimination of the multiple-ownership restriction for the E and F channel groups. If all of these restrictions are lifted, then, a single entity could acquire licenses for thirteen microwave channels in a community: eight MMDS channels, two MDS channels, and three OFS channels. Commenters are asked to discuss the benefits and drawbacks of such a rule and policy change. They should also discuss whether sales of MDS conditional licenses and OFS licenses for which facilities have not been built should be permitted, and what rules or policies should apply to any such sales, if permitted. Comments on the last issue should specifically

include comparison to the rules and rationales applied to sales of authorizations for unbuilt stations in other services.

Initiation of Service on Additional Channels:

12. Various difficulties having to do with the resolution of co- and adjacent-channel interference requirements are blamed for delaying the initiation of MDS service in particular markets. Modification of some rules, discussed below, should accelerate the grant of pending applications, and also simplify and speed consideration of new applications, thereby hastening the initiation of additional channels of service, without negative effects on other existing operations.

13. *Modifications to reduce interference.* MMDS applicants have occasionally complained that a literal reading of sections 21.902(a), 21.902(b)(3) and (4), and 21.904(b)(2) of the Commission's rules prevents closely spaced stations from applying for modifications to existing or proposed facilities that would permit the colocation and conformance of MDS facilities. They complain that the rules require an applicant to demonstrate that the modification results in the elimination of harmful interference to the protected service areas of existing or proposed co-channel and adjacent-channel facilities. Pursuant to section 21.902(a), (b)(3), and (b)(4) of the Commission's rules,[16] an applicant to modify a license or to amend an existing application must demonstrate that the proposed facility will not result in harmful interference within the protected service area of any existing or previously proposed co-channel or adjacent-channel MDS station within 50 miles or to the radio horizon, as appropriate. 47 C.F.R. §§21.902(a), (b)(3), (b)(4). The ambiguity that has apparently arisen is an indirect result of our decision, when allocating the E and F channels to the MMDS service, to group some of the initial MMDS applications for processing solely on the basis of channels and Metropolitan Statistical Areas ("MSAs") without full consideration of electrical mutual exclusivity.[17] As a result of this processing scheme, some MMDS stations have been proposed during the initial round of MMDS processing that could cause interference within the protected service areas of other first round MMDS licensees or tentative selectees.[18] Industry representatives have argued that when one of these closely spaced MMDS stations subsequently attempts to conform its station design to those employed by the other 2.1/2.5 GHz stations in a community or otherwise wishes to modify its system, total elimination of existing interference should not be required.

14. The interference problems of initial-round MMDS applications were not unanticipated. In adopting the interference protection scheme for MMDS, the Commission expressly recognized, with respect to the initial processing round, that because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applicants to comply fully with Section 21.902(a). We will therefore allow MDS construction permit holders to apply for modifications to their facilities in order to minimize interference potential with other MDS and ITFS operations.[19] We here propose to clearly establish the obligations that one closely spaced MMDS station has to another. Specifically, we propose to amend section 21.902 to permit the modification of any initial-round MMDS station that as initially proposed in 1983 would cause harmful interference to another MMDS station from the initial processing round. A showing would be required to demonstrate that the modification will not increase the size of the geographic area within the protected service area suffering harmful interference and will not cause harmful interference to any new portion of the protected service area of the interfered-with station. Comments are also solicited on the feasibility and advisability of considering the net increase or decrease in area or homes receiving interference rather than the specific previously interfered with area as the determinative factor in the consideration of such a modification request. Additionally, comments are solicited on the feasibility and advisability of considering the net increase or decrease in area or homes in the modifying station's protected service area that would receive interference as a factor in determining whether to grant a modification application.

15. *ITFS Cooperation.* Current MDS rules require that E and F channel applicants must file, prior to authorization and at such time as the Commission requests, an interference analysis regarding existing co- and adjacent-channel ITFS receive sites within fifty miles of the proposed MDS transmitter, and demonstrate no harmful interference for those sites or submit a statement from the affected ITFS licensee(s) stating its acceptance of the interference. 47 C.F.R. §21.902(i).[20] E and F channel conditional licensees are also required to file, prior to commencing construction, a statement from all co-and adjacent-channel ITFS licensees, permittees, and applicants with transmitters within fifty miles of the proposed MDS transmitters, stating that the proposed MDS operation will not cause harmful interference to that ITFS entity's operating or proposed facilities. 47 C.F.R. §21.901(d)(1). That rule further provides that if such statements are not forthcoming from the ITFS entities, the applicant may request a ruling as to whether harmful interference will occur, after submitting an engineering analysis and detailing the efforts made to obtain the desired statement from the affected ITFS entity. *Id.* These rules, although intended to operate at different points during the licensing process, are obviously somewhat redundant. Moreover, the sections 21.901 and 21.902 framework within which E and F channel conditional licensees seek to obtain interference statements from affected ITFS entities apparently has resulted in delay in some cases where the ITFS entities have been nonresponsive for a variety of reasons. Although there is already provision for proceeding without the desired ITFS statements, we propose now to simplify the procedure by eliminating the statement requirement entirely, and making the submission of analysis and notification to co- and adjacent-channel ITFS licensees, permittees, and applicants a single requirement for conditional licensees. In taking this step to eliminate the interference statement requirement, we observe that in most instances, the conditional licensee would be well-served by efforts to secure and submit such letters from affected ITFS entities, even in the absence of a rule requirement, as such letters could simplify engineering review and analysis of their proposals, and thereby expedite final Commission action. Parties may also comment on whether it would be more appropriate to require the analysis/statement submission as part of the application process, instead of waiting until a conditional license is awarded. We request comment on the desirability and appropriate implementation of such a modification to our rules. Commenters should also address whether it is more appropriate or useful to require analy-

sis and notification with respect to ITFS transmitters or with respect to ITFS receive sites within fifty miles (or some other specified distance) from the proposed MDS transmitter location.

16. *The 10 dB ITFS Protection Standard.* ITFS facilities are generally provided with 0 dB desired to undesired adjacent-channel interference protection ratio at each registered receive site.[21] Receive sites built before May 26, 1983, however, are provided with 10 dB protection, in recognition of the inferior quality of the downconverters and receivers in use at that time.[22] In some cases, new ITFS and MDS facilities have been proposed which would meet the 0 dB standard, but cannot meet the 10 dB standard at all sites built before May 26, 1983. The obvious solution is to upgrade the downconverter, and/or other receive equipment, where necessary, at the older receive sites. We therefore propose modification of our rules so that MDS applicants and conditional licensees can invoke the 0 dB standard if they will pay the expenses involved in upgrading ITFS receive sites built before May 26, 1983 with modern downconvertors or other appropriate receive equipment.

17. OFS licensees on the H channels do not currently have an adjacent channel interference standard. In the *OFS Notice*, *supra* at 3534, it was proposed that the benefits of increased private radio channel usage would outweigh the risk of interference caused by a lack of specific adjacent channel interference standards. This proposal was founded on the belief that the private radio industry would carefully engineer stations to avoid interference out of enlightened self-interest. Commenters in that proceeding, however, strongly disagreed with that position, insisting on the need for protection of the educational community using the ITFS channels (G channels) adjacent to the H channels. They also pointed out that we have previously determined that a 0 dB adjacent channel protection standard was appropriate for interference from MDS operations, and that most H channels are similarly used for video entertainment delivery. Upon consideration of these observations and arguments, we now propose adjacent-channel interference protection standards for the H channels identical to those applied for the E and F channels, *i.e.*, 0 dB desired to undesired adjacent channel protection ratio at all ITFS receive sites on file at the Commission, with a 10 dB standard for ITFS receive sites built before May 26, 1983 (with the same standard reference antenna for calculating interference, described at 47 C.F.R. §21.902(f)(3)). We also propose to permit H channel licensees, permittees and applicants to invoke the 0 dB interference standard for ITFS facilities built before May 26, 1983, where they agree to pay the expenses involved in upgrading those facilities with new downconverters or other appropriate receive equipment.

18. Commenters are invited to address this preliminary assessment of the propriety of these proposed protection standards, including the following specific questions. To what extent are these rules, as modified, likely to permit the grant of additional MDS and ITFS applications, or impede grant of OFS applications? What, if any, harm to ITFS operations could result, and how? What safeguards, if any, are appropriate to ensure that adequate equipment is timely installed to protect any affected ITFS licensee with receive sites built before May 26, 1983?

Point - to - Point ITFS Systems:

19. A number of ITFS operators use ITFS channels for point-to-point communications, often for studio to transmitter links ("STLs"). STL use of ITFS frequencies is licensed on a secondary basis; that is, it is subject to preclusion by an operator who proposes to use those channels for primary ITFS purposes.[23] In the case of E and F channels operated for ITFS on a grandfathered basis, however, there is no specific provision to permit an MDS operator to preclude operation of an ITFS STL on the E or F channels. It seems appropriate, in those cases where suitable alternative point-to-point spectrum is available,[24] to permit an MDS operator to preclude point-to-point ITFS operation on E or F channels on condition that the MDS operator defray the expenses of the required migration. Accordingly, we now propose to change our rules to effect such a policy. ITFS operators also operate point-to-point relay stations and point-to-point primary operations on the E and F channels (as well as on the other ITFS channels), and we further request comment on the desirability of permitting MDS operators to preclude all point-to-point operations by ITFS operators on the E and F channels, subject to the availability of suitable alternative spectrum and the MDS operator's willingness to pay the expenses involved in modifying the ITFS facilities. What, if any, detrimental effect would such changes have on the provision of ITFS services? What benefits for MDS service can be expected from such changes; specifically, how many new MDS channels are likely to be available as a direct result of such a rule change? What factors should be considered in determining the suitability of alternate spectrum? What additional rule changes would be necessary to provide for the eligibility of ITFS entities to operate in other bands? What administrative and practical burdens, both for ITFS and other operators and for the Commission, would result from out-of-band ITFS operations? What standards should be used to determine the adequacy of alternative point-to-point facilities proposed in a specific case, and what safeguards are appropriate to ensure that adequate equipment is timely installed for any ITFS operator changing frequencies under such a provision?

20. With respect to point-to-point operations on the ITFS frequencies, STL use is already relegated to secondary status, as mentioned in the preceding paragraph. We now raise the question of whether other point-to-point operations on ITFS frequencies should be subject to preclusion by ITFS operators proposing omnidirectional service. Would such a provision make additional ITFS channels available for MDS use on an excess capacity basis? Would such a provision enhance the delivery of ITFS and/or MDS services? What harm, if any, would result to ITFS systems currently operating point-to-point facilities? Is such a provision appropriate in light of the Commission's longstanding policy of maximizing point-to-point use where possible in the ITFS service? (47 C.F.R. §74.937(b)). Would such a provision constitute a penalty for operators who have or would follow this instruction? The additional questions asked in the preceding paragraph should also be addressed with respect to this issue.

ITFS Leases:

21. MDS channel capacity could obviously be increased if MDS operators enjoyed increased access to ITFS excess capacity. It may be appropriate to explore the extent to

which Commission restrictions on ITFS excess capacity leases may unduly limit access to or otherwise inhibit leasing of ITFS excess capacity.[25] For instance, does the ten-year limitation on lease terms, the same length of time as license terms, prevent or unduly discourage leasing? Does the 40-hour minimum ITFS use reservation critically limit the utility of ITFS channels to provide MDS service? On the other hand, can an ITFS entity that proposes a lesser number of hours of ITFS operation per channel justify its authorization for ITFS channels, particularly if it holds multiple channels? Does the requirement that ITFS licensees retain some ability to recapture time beyond 40 hours per week prevent or unduly discourage leasing? Would these restrictions be less onerous if MMDS and OFS multiple ownership restrictions are lifted; *i.e.*, if one entity can attain licenses for thirteen channels full-time, can it more readily accept the part-time status of additional channels utilized pursuant to excess capacity leases? Would elimination of these restrictions be likely to prevent ITFS licensees from responding to changing demands in the long term? On the other hand, cannot parties to excess capacity lease agreements, exercising their freedom to contract, adequately protect their respective interests without regulatory intervention? Finally, are there legal or practical impediments to eliminating lease restrictions entirely, and thus permitting licensees involved to determine the nature of the use of the spectrum?

Channel Control by Cable Systems:

22. It is currently possible for operators of coaxial cable television systems to apply for and be authorized to operate OFS and MDS channels within their franchise areas, and many have done so. Such authorizations can be useful to a coaxial cable system to fill in service in the less densely populated areas within its franchise area. They are also subject to warehousing, intentional or not, and underutilization, intentional or not, both of which have the deleterious effect of restricting competition in the delivery of video programming to homes. Consequently, we are now considering prohibiting or limiting ownership or use of the H channels and MDS channels by a coaxial cable system within its franchised service area. Comments are solicited on whether the potential preclusion of MDS competition to coaxial cable delivery systems implicit in warehousing or underutilization of MDS and OFS channels by coaxial cable system operators outweighs the benefits possible in licensing these microwave frequencies to a coaxial cable operator within its franchise area. Is this balance changed in areas in which more than one coaxial cable system operates? Should ownership and/or control or use of OFS and MDS channels be prohibited to coaxial cable systems within their franchise areas entirely, or should a fixed limit on coaxial cable system use be imposed? Should existing coaxial cable systems' licensure or use of these channels be grandfathered? Should any restriction be lifted for coaxial cable systems subject to competition or facing actual competition from other coaxial cable systems, or where other effective competition exists? How should effective competition be defined for purpose of the application of this rule? [26] Should any such restriction(s) be forborne in areas with no MDS licensee or applicant, and can a restriction practically be reimposed upon the emergence of an MDS operator? Should the same restriction(s) apply to use of ITFS excess capacity? Commenters are referred to the Commission's earlier consideration of this issue in *ITFS Reallocation Order*, *supra* at 1267.

Comband Potential:

23. "Comband" technology provides for the transmission of two separate and independent video signals on a single 6 MHz channel.[27] Use of this technology has been approved, subject to application, in both the MDS and ITFS services.[28] In the ITFS service, the additional (twenty) signals that can be provided by Comband transmission are considered to be "excess capacity" in their entirety, and thus would be available for MDS use on a full-time basis. Consequently, the number of possible MDS channels can be increased from ten to twenty, and twenty more ITFS channels can potentially be added for MDS use on a full-time basis. Comband operations are permissible on the H channels under current OFS regulations, which would add three more potential channels of service. Thus, use of Comband techniques on all channels would increase an operator's channel capacity from thirteen full-time to forty-six full-time channels (presuming full cooperation by all local ITFS licensees), in addition to the twenty ITFS channels potentially available on a part-time basis. We seek information and comment on the adequacy and availability of Comband equipment, and the effect its availability would have on the need for or desirability of the other rule and policy changes proposed herein. Conversely, we seek comment on the effect some of those rule changes could have on the adequacy of Comband systems, and on what additional changes could enhance the viability of Comband operations.

SERVICE CAPABILITY IMPROVEMENTS

24. In addition to the number of channels a video delivery system can offer, the nature, variety, and quality of services provided affect the desirability and thus the marketability of such a service. Additionally, the size of a service area and number of potential subscribers reached have an obvious effect on the viability of an MDS operation. A number of factors affect the ability of an MDS operator to provide a package of consistently clean signals within a service area of sufficient size to support such a business and to benefit the public. Principal among those factors governed by our rules are power limits, signal strength uniformity, station assignment criteria, and equipment performance standards. Other rules affect the availability of auxiliary spectrum to provide ancillary capabilities, such as program production. A number of these rules and possible modifications to these rules that can enhance an MDS operator's service capabilities are discussed in the paragraphs below.

Increase and Conform Power Limits:

25. A critical technical factor affecting the quality of service that an MDS operator can provide is the strength of its signal. Operators in all three services are limited to 10 watts transmitter output power for the channels at issue here.[29] We have already recognized that most MDS operators have been granted exceptions and authorizations to operate at 100 watts, and we have proposed to modify the MDS rule to that standard (with an additional limitation for directional antennas, further discussed in the next section below). *MMDS Further Notice*, *supra* at 12 - 16.

Numerous comments regarding the MDS power limitation have been filed in response to the *MMDS Further Notice*, and will be incorporated in this proceeding. A petition for reconsideration of *First Report and Order* in Gen. Docket No. 80-113 (" *MMDS Report and Order* "), 98 FCC2d 68 (1984), was filed by Merrill Communications, Inc., requesting, among other things, that the power limitation for ITFS also be raised to 100 watts, and that petition, as well as oppositions thereto, will also be considered in this proceeding.

26. There are obvious advantages to MDS operators using OFS and ITFS channels at uniform, as well as higher, power levels, so as to achieve consistent quality and performance in their delivery of video services to subscribers at minimum cost. (Higher transmission power reduces the size of receive antennas and the overall cost of receive equipment.) Additionally, increasing ITFS signal power may reduce constraints on the location and signal strength of MDS operations on channels adjacent to local ITFS operations. On the other hand, we have traditionally held the view that the primary mission of the ITFS service, delivery of educational material for use in accredited instruction, is better served by facilities operated by individual schools, with each station's range limited to that necessary to provide an adequate signal to its own individual receive sites. Permitting ITFS operations at significantly greater power levels on a regular basis may have a preclusive effect on the institution of additional ITFS systems. Accordingly, we seek comment on any limiting effect that the lower ITFS power limits may have on MDS stations and MDS service, as well as the extent of preclusion which would result from raising the ITFS power limitation. We also seek comment on the propriety or necessity of conforming the OFS power limitation for the H channels to that for the MDS channels, if the MDS power limitation is raised to 100 watts, as proposed. Finally, we seek comment on whether 100 watts should be routine for any or all of these services, or should be permitted only under specifically defined circumstances in any service. Again, commenters already on record on this issue in General Docket No. 80-113 are urged to reference, rather than repeat, their arguments, to the extent possible. We also express the initial impression that existing rules regarding applications and notifications to affected parties should afford any affected parties a full opportunity to defend their rights to operate without harmful interference due to a power increase proposed pursuant to any rule change adopted in this proceeding. Comments are solicited on this related issue.

Output Power Standard:

27. In *MMDS Further Notice*, *supra* at 9 - 12, we proposed to specify the maximum allowable output of MDS stations in terms of equivalent isotropically radiated power, or EIRP, which is the power radiated from the antenna in a given direction.[30] This measure, accounting for line loss and antenna gain, in addition to transmitter output power, is a more accurate measure of a station's ability to serve (or to interfere with) an area or receive site. At the same time, we proposed to determine allowable EIRP for directional antennas by the formula:

$$EIRPmax = EIRPomni + 10 \log (360/beamwidth).$$

For example, if the power limitation for any service is raised as contemplated in paragraphs 25 and 26, above, the power limitation standard would limit maximum allowable EIRP in any direction to 33 dBW + 10 log (360/beamwidth). [31] Comments filed by Hubbard Broadcasting, Inc. in General Docket No. 80-113 have demonstrated that this formula would permit a narrow area to be subjected to extreme radiation if a high gain parabolic antenna were utilized. Accordingly, we here propose to further modify the formula to provide a cap on the maximum directional EIRP, as suggested by Hubbard. Our view at this time, again assuming the proposed increase in power limitations, is that 6 dB above 2000 watts (33 dBW), for a total of 8000 watts (39 dBW), would be a good compromise between power requirements and spectrum efficiency. Accordingly, we propose the following rules for power limitations, in the place of specifications limiting transmitter output power:

Maximum allowable EIRP = 23 dBW + 10 log (360/beamwidth), where 10 log (360/beamwidth) ≤ 6 dB

or

Maximum allowable EIRP = 33 dBW + 10 log (360/beamwidth), where 10 log (360/beamwidth) ≤ 6 dB

depending on whether we decide to increase power limits. Commenters are invited to address the propriety of utilizing EIRP as the measure of output power for each service, and the utility of the above statements of limitation. With respect to the applicability of the maximum directional power limitation for ITFS systems, we harbor some initial reservations. Specifically, in the ITFS service there appears to be extensive use of highly directional beams (which may exceed the maximum), frequently on a multiple-beam basis, to serve individual receive sites which are remote or which suffer interference constraints. We would be very reluctant to preclude the carefully engineered use of highly directional beams for such purposes in the ITFS service.

Interference Protection/Assignment Standards:

28. MDS operators are currently given a 710 square mile service area (a fifteen-mile radius boundary for an omnidirectional antenna), within which they are entitled to protection against harmful interference.[32] ITFS licensees are guaranteed a certain level of noninterference from new operators at all receive sites registered with the Commission.[33] Interference standards have not yet been formally adopted for the H channels, with applications currently processed subject to a fifty-mile co-channel separation standard. We have already proposed adopting the fifty-mile separation, with assumptions of a 300-foot transmit antenna height and 30-foot receive sites, for the H channel assignment criterion, on the expectation that this would provide service areas for H channel operators of roughly 20-mile radius. *OFS Notice*, *supra* at 3533. Both the MDS protected service area and OFS mileage separation criterion need to be reexamined in light of the increased output powers proposed herein, as well as the desirability of a more uniform approach to this issue in the two services, and comments are invited on both of these issues. Parties may also comment on the advisability of the current receive antenna height and standard receive antenna reference pattern used for interference calcula-

tions (see n. 32, above). Comments already filed on this issue in PR Docket No. 88-191 will be incorporated into this proceeding, and comments in General Docket No. 80-113 can be incorporated by reference. Our initial view is that it is simply not appropriate for the allocation of ITFS stations to be governed by specified geographic service areas or mileage separations, or for MDS or OFS stations to be protected with respect to individual receive sites, but we will accept comment on this issue as well. In this connection, commenters should address the need to have conforming assignment standards, and are advised that our initial inclination is that uniform co-channel assignment criteria for the MDS and OFS channels would be desirable.

Equipment Performance Standards:

29. *Transmitter tolerance.* OFS and ITFS rules currently require that for the H channels and all ITFS channels the visual carrier shall be maintained within 60 kHz of the assigned frequency.[34] MDS rules currently require that the visual carrier be maintained within 0.001% of the nominal frequency (± 21.5 kHz) for channels 1, 2, and 2A, and within 0.005% of the nominal frequency (± 130 kHz) for the E and F channels.[35] We have already proposed to tighten the frequency tolerance for H channel, E and F channel, and channel 1, 2, and 2A transmitters, to require that video transmitters on these channels maintain their visual carrier to ± 1 kHz of assigned frequency. [36] Comments filed in those proceedings persuade us to reiterate this intention, and to propose to extend the requirement to ITFS stations and to limit the requirement to new stations in each service. Comments previously filed in PR Docket No. 88-191 and in General Docket No. 80-113 will be considered in this proceeding, and additional comments regarding the extension of this rule to ITFS service will also be entertained.

30. *Out - of - band emissions.* The applicable sections of our rules for MDS, ITFS and OFS[37] currently require that emissions in the 2.1/2.5 GHz bands appearing on frequencies more than 3 MHz above or below the upper and lower edges of the assigned channel shall be attenuated no less than: (1) 30 dB for transmitters rated at less than 10 watts visual peak power output; and (2) 40 dB for transmitters rated at 10 watts or more. In *OFS Notice*, *supra* at 3534, and *MMDS Further Notice*, *supra* at 17, we expressed our concern that these existing levels of required attenuation may be insufficient to prevent adjacent channel interference. In order to alleviate this problem we suggested in both dockets that the level of required attenuation on frequencies more than 3 MHz above or below the upper and lower channel edges, be increased to 60 dB for new stations. The record in these dockets is sufficient to pursuade us to reiterate our intention to tighten the emission standard for OFS and MDS, and to propose its applicability to ITFS.[38] We propose that the requirement apply only to new stations, with existing stations in all services afforded grandfathered status. In General Docket No. 80-113, Microband Communications of America pointed out that the proposed standard is incomplete in that it does not specify maximum emissions in the regions between the channel edge and ± 3 MHz beyond the channel edge on either side. We seek comment regarding the necessity of such a rolloff limitation, [39] as well as suggestions as to the appropriate attenuation characteristics of such a limitation. Our initial inclination, if this additional limitation is deemed necessary, is to specify a constant slope attenuation connecting the emission value at channel edge with the 60 dB figure at ± 3 MHz from the band edge. Comments are invited on the appropriateness of this attenuation characteristic and any documentation with regard to the achievability and cost effectiveness from a transmitter manufacturing viewpoint. Comments previously filed in PR Docket No. 88-191 and in General Docket No. 80-113 will be considered in this proceeding, in addition to any further comments which may be filed regarding these matters.

31. *Aural Power Levels.* Sections 21.904(d) and 74.935(d) of our rules specify peak aural power limits between 10 and 20 percent of the peak visual signal power for MDS stations and between 10 and 70 percent of the peak visual signal power for ITFS stations. (47 C.F.R. §§21.904(d), 74.935(d).) With the increasingly widespread use of adjacent channel frequencies in any area, it appears that these limitations may now be inappropriate. In fact, the lower limits of 10 percent, in both instances, may not be low enough to prevent the aural portion of one channel from interfering with the visual portion of the immediate upper adjacent channel. Accordingly, we propose to eliminate the minimum aural power requirements of sections 21.904(d) and 74.935(d) in order to facilitate the development of adjacent channel operations and allow MDS operators the freedom to explore and find individual minimum aural power levels while maintaining satisfactory service to their viewers. It also appears that the upper aural power limits of 20 percent and 70 percent, for MDS and ITFS respectively, are far higher than necessary to assure adequate aural signal delivery. Since such high aural power substantially increases the risk of interference to upper adjacent channel users, we seek comment on the appropriateness of a 10 percent maximum figure for peak aural power for OFS, MDS and ITFS. What affect would this limit have on licensees using older transmitting equipment? Are such older transmitters equipped with attenuation circuitry which would permit simple adjustment of aural power down to the proposed levels? If not, should the older transmitters be given grandfathered status? In the event the rules are changed and grandfathered status is accorded older facilities, should such grandfathered operations be required to accept new equipment when offered at no cost by another party seeking to reduce this adjacent channel interference?

Signal Boosters:

32. Low-power same-channel signal repeaters, referred to here as "boosters," can be utilized to fill in "holes" in service areas resulting from terrain depressions and physical obstructions (*e.g.*, buildings or bridges). The use of boosters for MDS service was proposed in *MMDS Further Notice*, *supra* at 20, and supported by all comments in response. Upon consideration, we believe they can be equally useful in the OFS and ITFS services, and hereby propose such use. Based on the comments already received, we propose a maximum EIRP of 18 dBW, and to restrict the physical location of the booster to the protected service area of an MDS station.[40] We seek comment on an appropriate location specification for ITFS and OFS stations. Commenters may, of course, address these preliminary determinations, but should do so with the previously filed comments in mind. We also propose that boosters be certified the same way as all other transmission equipment, including main station transmitters. We

further propose to require specific authorization to operate a booster and to require application, notification, and public notice, prior to issuing such an authorization. A single booster could serve to repeat all of the signals used in an MDS system, and that MDS system could be utilizing channels in three different services and licensed to several different entities and individuals. We seek comment on the resulting administrative difficulties that may be imposed on licensees and the Commission staff, and suggestions for reducing such problems.

Access to Auxiliary Frequencies:

33. MDS operators are not currently included in the list of entities eligible for low power auxiliary stations. 47 C.F.R. §74.832. These frequencies are available to MDS's competitors, particularly coaxial cable systems.[41] In view of the similar nature of the service MDS operators propose to provide, we see no reason to continue their exclusion. Accordingly, we propose to add MDS operators to the list of eligible entities in section 74.832, and seek comment on this proposal. Also, we request comment on whether the eligibility rules and/or definitions of Part 78 of the Commission's rules should be amended to provide MDS operators with access to cable television relay service ("CARS") spectrum,[42] on a basis equal with coaxial cable system operators.[43] In addition, we seek comment on the impact of adding MDS operators as eligible users on the current and future users of these frequencies under the present eligibility rules.

OTHER MATTERS

34. Our broad review here of the rules and policies affecting MDS services requires consideration of a few additional matters. Although they may not have as direct or as significant an effect on the provision of MDS service as the measures discussed above, concerns relating to response channels, H channel application filing procedures, and annual reports warrant our attention and are raised in the following paragraphs.

Response Channels:

35. Each of the channels in the 2.5 GHz band has associated with it a 125 kHz response channel, to permit two-way communication.[44] In *OFS Notice*, *supra* at 3538, we noted the lack of use of the response channels by H channel licensees, and proposed to disassociate those channels from the H channels and license them separately for any fixed point-to-point use, subject to the interference criteria of Section 94.63 of the Commission's rules. (47 C.F.R. §94.63.) That proposal and the comments filed in response, which generally supported our proposal, will be considered in this proceeding, and we seek additional comments regarding the use of the response channels in any of the services which are the subjects of this proceeding. On this issue, we do note that response channels are frequently used in the ITFS service to provide interactive capabilities for classroom instruction, and have a potential for use for customer communications for MDS systems, *viz.*, ordering pay-per-view programming. We ask commenters to address the future of commercial interactive video systems and how many response channels would be needed for successful implementation of such a system.

Application Filing Procedures:

36. In *OFS Order*, *supra*, also adopted today, we establish new criteria for determining mutual exclusivity for OFS applications, effecting a first-come, first-served filing process for OFS applications. Incompatible OFS applications will be considered mutually exclusive only if they are filed on the same day for the same frequency in the same location. In that Order, we exclude the H channels from that procedure, pending consideration of the utility of such a procedure in light of the differing filing procedures for the MDS and ITFS services. *Id.* at para. 33. We here seek comment on this issue in this proceeding. We also seek comment on the utility and propriety of such a filing procedure for the MDS service, and more generally, seek suggestions and comments on any application procedure than can be uniformly applied to two or all three of the services that are the subject of this proceeding, and whether such uniformity is particularly desirable. In conjunction with this inquiry, we also specifically seek comment on the desirability of reducing the cut-off period for ITFS applications (the period during which competing applications and petitions to deny can be filed) from 60 to 30 or 45 days.[45]

Annual reports:

37. All MDS operators operating as common carriers are required to file an annual report with the Commission, including, among other things, a condensed balance sheet, a condensed income statement, the number of subscribers served, the total number of hours of service, the number of hours in a variety of specified service categories, and specified information regarding affiliated subscribers. 47 C.F.R. §43.72. While there may have been additional regulatory justifications for this information when the rule was originally adopted,[46] the rule now functions primarily as a means to monitor and ensure use of MDS frequencies. (*See* 47 C.F.R. §21.303(d).) Accordingly, we propose to reduce the information required, by deleting subsections (a)(3), (a)(4), and (a)(6), which require balance sheets, income statements and affiliation information, and by modifying subsection (a)(5)(iii) to simplify the hours of service information required.[47] Commenters may make additional suggestions regarding appropriate information to be included in the annual reports. We also note that when MDS operators were given the option of electing status as non-common carriers, the rule was not modified to include such operators. There is no apparent valid basis for this distinct treatment. We seek comment on whether the rule should be modified to include all MDS licensees, and the rule section moved into Part 21 of our rules. We also seek comment on whether a similar rule should be adopted for H channel operators, and for MDS use of ITFS facilities.

INQUIRY

38. While we are confident that the rule changes discussed above have a clear potential to improve and enhance MDS operations, two additional matters also merit consideration. Because these ideas are less fully developed at this time, we are not prepared to propose specific Rule Making. Rather, we hereby initiate an inquiry into the advisability and means of both increasing MDS access to currently vacant ITFS channels and reallocating the H channels from the OFS to the MDS service.

Licensing Non - ITFS Entities on Unused ITFS Frequencies:

39. In a number of communities below the top-30 markets, there are several ITFS frequencies that have not been authorized for use or applied for. These unused frequencies benefit neither the educational community nor the public at large, and are not accessible by the video entertainment distribution industry even on an excess capacity basis. It is likely that many of these communities could benefit from MDS service if more channels were available to MDS operators; it is also quite possible that educational institutions and organizations would initiate service were facilities already built and available. Consequently, we will undertake an inquiry into the feasibility and advisability of permitting non-ITFS entities to secure licenses for ITFS facilities which are not authorized to or applied for by ITFS entities, subject to certain restrictions with respect to making time and, possibly, facilities available to educational users. Our emphasis in this endeavor, at this point, will be to predict the likely future educational use of currently vacant ITFS channels and explore ways to preserve the capacity of the ITFS frequencies for such future educational use, and even, if possible, enhance the likelihood and extent of such future use and hasten its arrival. Commenters are asked to address the likely benefits to accrue to individual MDS operators and the MDS industry as a whole; whether, why, and how ITFS service would be favorably or negatively affected; and the net resulting effect on the public interest. In such comments, commenters should also discuss whether the independent construction of ITFS-compatible facilities by non-ITFS operators will increase the likelihood of ITFS service, or decrease the likelihood of ITFS service by removing the potential for MDS or other commercial support, via lease payments, of such an ITFS service. Would the size and nature of markets currently lacking ITFS facilities prevent MDS operators from offering significant lease payments for the use of ITFS facilities? Would facilities designed to maximize MDS service be inappropriate for ITFS use, or is this irrelevant if separate ITFS facilities can be built by ITFS entities for use during different parts of the day?

40. This authorization, if determined to be desirable, could be accomplished in a variety of ways. One that will be raised here is to grant a license for ITFS frequencies to a non-ITFS entity subject to predetermined requirements to make transmission facilities available for certain amounts of time or specified hours of the day to certain or all qualified educational entities that come forward at any time in the future. Questions to address include what specified periods or amount of time should be subject to loss to ITFS entities and how to determine what educational entities or organizations should be entitled to use of the facilities, and which application, processing, mutual exclusivity, or licensing rules should govern such use. Another approach would be to set aside a specific time of day for which ITFS facilities can be licensed solely to non-ITFS entities, *e.g.*, 4:00 p.m. to 8:00 a.m., using MDS procedures and rules, with the remaining time subject to normal ITFS application, selection and licensing procedures. Which of these, or some other approach, would simplify processing and provide the greatest degree of certainty for MDS and ITFS planning and operations, *e.g.*, would potential MDS operators prefer the fewer, but specific and guaranteed, hours per day set aside for their use under the second approach? Would ease of processing and administration significantly favor one approach or the other? Under any alternative licensing approach, should ITFS applicants be given an absolute comparative preference for any ITFS channels vis-a-vis a non-ITFS entity that has applied for the same channels under any such provision adopted?

41. For either of the approaches outlined above, or for any other provision for similarly increasing the use of vacant ITFS channels, should the number of channels licensed to a non-ITFS entity under such a provision be limited to a percentage of those available or to a total number in a community? Should there be a minimum number of channels that remain available 24 hours a day, or all evening until 10:00 p.m., or for some other period outside the core 9:00 - 3:00 or 8:00 - 5:00 typical school hours, for ITFS use for each community? Alternatively, can we assume that the current lack of ITFS use in such communities implies the likelihood of a lesser ultimate demand for extensive hours of ITFS service? Should there be a "last-chance" period of time for ITFS applications before opening the ITFS channels to non-ITFS applications?

Reallocation of OFS Channels:

42. A number of the modifications proposed herein reflect an effort to conform OFS requirements for the H channels with MDS requirements. It appears that H channel facilities are increasingly used for MDS service, and there may be little other use at this time. Accordingly, we inquire into whether the H channels should simply be reallocated to the MDS service. In so doing, we will investigate the extent of non-MDS use of the H channels, and the ramifications for current non-MDS users of such a reallocation, and seek information and comments on these matters. Commenters should address whether non-video OFS point-to-multipoint operations can be satisfied in the 900 MHz, 10.6 GHz, and 18 GHz bands. We will also investigate the possibility and utility of reallocating the H channels on a shared band basis, *i.e.*, so that they can be authorized in either service, and we seek comment on the conflicts or difficulties that such a shared band allocation would engender, as well as the best methods to deal with such problems.

ADMINISTRATIVE MATTERS

43. Authority for this proceeding is contained in Sections 1, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **April 23, 1990,** and reply comments on or before **May 23, 1990.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. All relevant and timely comments will be considered by the Commission before final action is taken

in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in its decision.

44. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally*, 47 C.F.R. §1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. §1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. §1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. §1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labled or captioned as an *ex parte* presentation. 47 C.F.R. §1.1206.

45. *Regulatory Flexibility Act Initial Analysis:* An initial regulatory flexibility analysis is attached as Appendix A.

46. *Paperwork Reduction Act:* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

47. For further information on this proceeding, contact Bruce A. Romano, Mass Media Bureau, (202) 632-9356.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] General Docket No. 90-54 will also include issues raised and comments filed in PR Docket 88-191, which was terminated in *Report and Order* in PR Docket No. 88-191, FCC 90-61, adopted February 8, 1990.

[2] By use of the term "wireless cable," we do not intend to suggest that these services constitute cable service for any statutory or regulatory purposes.

[3] In this document, "MDS" will generally be used to refer collectively to single- and multiple-channel MDS. The use of "MMDS" will specifically refer to that individual service in those cases where the distinction is significant. Single-channel MDS will be referred to as such, where appropriate.

[4] 47 C.F.R. §§94.9(a)(1), 94.61(b), 94.65(f).

[5] 47 C.F.R. §74.931(e).

[6] Channel 2A consists of four of the six MHz specified for Channel 2, and is designated for use outside of certain cities and on a noninterference basis. *See* 47 C.F.R. §21.901.

[7] The MDS channels are located in the 2.1 GHz band, while the MMDS, OFS and ITFS channels are located in the 2.5 GHz band.

[8] *Notice of Inquiry* in MM Docket No. 89-600, FCC 89-345, released December 29, 1989.

[9] According to Paul Kagan Associates, Inc., MDS systems accounted for approximately 0.4% of all wire and wireless cable subscribers in 1989. *Multicast*, October 16, 1989, p. 4. *See generally Notice of Proposed Rule Making* in MM Docket No. 90-4, FCC 90-12, released January 22, 1990, paras. 25 - 28.

[10] We are aware that MDS operators frequently identify the unavailability or disciminatory pricing of premium programming services or packages, such as HBO, Showtime, ESPN and others, as a principal impediment to the growth of their service and their ability to compete. While this matter is of considerable concern to us insofar as it affects the overall prospects of the MDS industry as an effective competitor in the video marketplace, we do not contemplate consideration of this issue in this proceeding. We note, however, that to the extent program availability may be adversely affected by vertical integration in the coaxial cable television industry, the question is already before us in a separate proceeding. *See Notice of Inquiry* in MM Docket No. 89-600, FCC 89-345, released December 29, 1989, paras. 60 - 65.

[11] Several of the issues raised in PR Docket No. 88-191, affecting services in frequency bands other than 2.5 GHz, are resolved in *Report and Order* in PR Docket No. 88-191 (" *OFS Order* "), also adopted today (FCC 90-61).

[12] 47 C.F.R. §21.902(d); *First Report and Order* in Docket No. 19671, 86 FCC2d 299, 309 (1981), *aff'd. Memorandum Opinion and Order* in Docket No. 19671, 99 FCC2d, 715, 725 (1983).

[13] *Report and Order* in Gen. Docket No. 80-112 (" *ITFS Reallocation Order* "), 94 FCC2d 1203, 1245 (1983).

[14] *Memorandum Opinion and Order* in Docket No. 19671, *supra* at 725.

[15] We note that because a single entity is permitted to lease all of the available channels, restricting MDS operators' eligibility to hold licenses for MDS and OFS channels is not likely to promote any goal of programming diversity.

[16] Where transmitter output power in excess of 10 watts is sought, section 21.904(b)(2) applies. 47 C.F.R. §21.904(b)(2).

[17] *ITFS Reallocation Order*, *supra* at 1263. The genesis of the ambiguity is the Commission's earlier adoption of a licensing scheme in 1974 for closely spaced single-channel MDS stations, implemented in section 21.902(a) and (c) of the Commission's rules.

[18] For example, it is possible that the E and F channel tentative selectees for the Washington MSA initially proposed facilities that could cause co-channel interference within the protected service areas of the E and F channel selectees in the Baltimore MSA, while each of the selectees for the Baltimore MSA initially proposed facilities that could cause co-channel interference within the protected service areas of the selectees for the Washington MSA.

[19] *ITFS Reallocation Order*, *supra* at 1265.

[20] Such information is typically requested subsequent to the random selection process and prior to awarding a conditional license to the tentative selectee.

[21] 47 C.F.R. §§21.902(e)(2), 74.903(a)(2).

[22] 47 C.F.R. §§21.902(f)(2).

[23] *Report and Order* in MM Docket No. 83-523 (" *ITFS Order*"), 98 FCC2d 925, 931 (1984).

[24] For example, we recently initiated a proceeding proposing to make certain 18 GHz OFS frequencies available for these types of uses. *Notice of Proposed Rule Making* in PR Docket No. 90-5, FCC 90-??, released January 23, 1990.

[25] Excess capacity leases are governed by Section 74.931(e) of the Commission's rules (47 C.F.R. §74.931(e)) and *Second Report and Order* in MM Docket No. 83-523, 101 FCC2d 50, 87, 90-91 (1985). These rules specify the minimum amounts of ITFS use on each channel required before its excess capacity can be used for non-ITFS purposes, limit the length of a lease, and forbid provisions that would threaten the ITFS licensee's maintenance of control over its station and its ability to meet its primary educational needs.

[26] The issue of effective competition to cable for purposes of local rate regulation is addressed in *Notice of Proposed Rule Making* in MM Docket No. 90-4, *supra*.

[27] The manner in which this is accomplished is explained in *General Electric Co.*, 61 RR2d 143 (MM Bur. 1986).

[28] *General Electric Co.*, *supra*; *General Electric Co.*, 60 RR2d 1665 (CC Bur. 1986).

[29] 47 C.F.R. §§21.904(a), 74.935(b), 94.73(a). Section 21.904(b) permits authorization of power up to 100 watts (where consistent with interference limitations) only upon a showing of need, *i.e.*, if it can be demonstrated that the additional power is required " . . . to provide adequate, reliable service to a reasonable service area . . . ."

[30] EIRP is the product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna. For a further description of EIRP, refer to *MMDS Further Notice*, *supra* at 9, n. 6.

[31] For purposes of this rule, "beamwidth" is the total horizontal plane beamwidth of the radiation pattern of the station's antenna system in degrees, measured at the half-power points, or the sum of such beamwidths if there are more than one main beam in the radiation pattern. (For omnidirectional antennas, 10 log1 is 0, leaving their maximum allowable EIRP at 33 dBW.) In arriving at 33 dBW (2000 watts), we assumed the proposed 100 watts transmitter output limit, 0 dB line loss, and the normal gain of an omnidirectional transmitting antenna for these services to be 13 dBi.

[32] 47 C.F.R. §21.902(d), (e). Within a protected service area, harmful interference is calculated using a 30-foot receive antenna height and a standard receive antenna reference pattern. In a petition for reconsideration of the *First Report and Order* in Gen. Docket No. 80-113, 98 FCC2d 68 (1984), Microband Communications of America proposed that: (1) a different standard antenna reference pattern be used; and (2) all potential receive sites on any building above 30 feet in the protected service area be specifically protected. Microband's petition for reconsideration will be considered in this proceeding. Our initial view is that it should be denied, but in light of the overall review undertaken here, we will accept additional comments on this matter by interested parties.

[33] 47 C.F.R. §§21.902(e)(2), 74.903(a)(2).

[34] 47 C.F.R. §§74.961(a), 94.95(e).

[35] 47 C.F.R. §§21.101(a), 21.908(c).

[36] *OFS Notice*, *supra* at 3534; *MMDS Further Notice*, *supra* at 16 - 17.

[37] 47 C.F.R. §§21.908(b), 74.936(b) and 94.95(a).

[38] We note that the concept of tightening the out-of-band emission requirement for the ITFS service was explored and dismissed in *Memorandum Opinion and Order* in MM Docket No. 83-523, 59 RR2d 1355, 1386 - 1387 (1986). It is possible that additional evidence now exists to justify tightening these standards for ITFS stations as well.

[39] Rolloff is the signal attenuation characteristic beginning at the band edge, usually expressed in dB per octave.

[40] We anticipate that utilization of such boosters will be designed for providing service to small areas within a geographic area equivalent to the protected service area of an MDS station. These small areas may be precluded from reception by the shadowing effects of tall buildings, ground depressions, or other propagation anomalies. Given this limited authorized purpose, excessive power levels should not be necessary. We refer interested parties to a report entitled "Microbender T. M. Demonstration -- Washington, D.C., November 28, 1989," prepared by John Ramsey of California Amplifier, Inc. This report details results of a successful booster demonstration using a parabolic reflector (24 dB gain) driven with less than 10 mW transmitter power for an EIRP of less than 4 dBW.

[41] These frequencies are used for wireless microphones, cueing controls, and other program production implements.

[42] CARS use is permissible in the nominal 2 GHz, 7 GHz, 13 GHz, and 18 GHz bands.

[43] Limitations on MDS operators' use of the 18 GHz band, one of the bands shared with CARS users, were recently proposed for elimination in *Notice of Proposal Rulemaking* in PR Docket No. 90-5, *supra*.

[44] *See* 47 C.F.R. §§74.939, 94.65(f).

[45] The current ITFS cut-off rules are contained in Section 74.911(c) of the Commission's rules. 47 C.F.R. §74.911(c).

[46] *See Report and Order* in Docket No. 19493, 45 FCC2d 616, 626 (1974).

[47] Commenters may wish to compare or distinguish the need for information from cable operators, from whom we recently have proposed to gather information similar to that whose collection we are here proposing to eliminate for MDS operators. *See Notice of Inquiry* in MM Docket No. 89-600, *supra*.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules, Pertaining to Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: private Operational-Fixed microwave Service (OFS), Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), Instructional Television Fixed Service (ITFS), and Cable Television Relay Service (CARS).

I support aspects of the Notice of Proposed Rule Making seeking to conform many of the rules governing the technical requirements of the OFS, MDS/MMDS and ITFS services. The current inconsistencies in the technical rules governing these services create difficulties for MMDS licensees who are seeking additional channels to provide an alternative means for the delivery of video programming. I also strongly support the proposal to reduce the reporting requirements of MDS/MMDS licensees.

I am aware that some of the proposals presented in the Notice of Proposed Rule Making and Notice of Inquiry may have significant ramifications for the Instructional Television Fixed Services. I have been and continue to be a strong supporter of educational broadcasting and ITFS. I strongly supported the revisions to the Commission's Rules that allow ITFS licensees to lease excess channel capacity. Leasing arrangements provide the necessary funds to help secure educational/instructional programming. On the other hand, I am concerned with spectrum that remains fallow and I believe that alternative uses of fallow spectrum should be considered. Perhaps alternative uses of fallow ITFS spectrum could benefit both the educational needs of the local schools and the needs of entrepreneurs. I encourage existing and potential ITFS licensees to participate in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

CARMEL BROADCASTING LIMITED PARTNERSHIP (hereafter "Partnership") — File No. BPH-880208MK

LONE CYPRESS RADIO ASSOCIATES, INC. (hereafter "Lone Cypress") — File No. BPH-880210ML

GEORGE S. FLINN, JR. (hereafter "Flinn") — File No BPH-880211MI

CALIFORNIA KOOL BROADCASTERS LIMITED PARTNERSHIP (hereafter "California Kool") — File No. BPH-880211MJ

HIGHLANDS BROADCASTING CO., INC. (hereafter "Highlands") — File No. BPH-880211MK

PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP (hereafter "Paso Hondo") — File No. BPH-880211ML

STODDARD JOHNSTON AND SHERRIE McCULLOUGH d/b/a/ J & M BROADCASTING COMPANY (hereafter "J&M") — File No. BPH-880211MM

CAL TOWER BROADCAST. GROUP (hereafter "Cal Tower") — File No. BPH-880211MR

For Construction Permit for a New FM Station; Channel 238A, 95.5 MHz Carmel, California

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Flinn.* The applicant proposes to mount his antenna on an existing land mobile tower. However, Flinn's elevation, coordinate and overall tower height data listed in his application is inconsistent with records in the Commission's data base. While these discrepancies do not render Flinn's application unacceptable, he will, however, be required to provide a clarifying amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *California Kool.* Information before the Commission indicates that California Kool was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

4. An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question California Kool's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

5. *Paso Hondo.* 47 C.F.R. § 73.3526(d) requires that applicants for new FM broadcast stations maintain a public file in the community to which the station proposes to

be licensed. In an amendment filed on October 17, 1988, Paso Hondo indicated that it has located its public file at the Carmel Valley Library. Carmel Valley's library is located approximately 15 miles outside the incorporated boundaries of Carmel, California. Accordingly, Paso Hondo will be required to locate its public file within the incorporated community of Carmel and to so notify the presiding Administrative Law Judge within 30 days of the release of this Order.

6. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Paso Hondo has filed such statement, it is deficient. Paso Hondo has failed to include a response to Item 5 (training). Section VI of FCC Form 301. Accordingly, Paso Hondo will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

7. *J & M*. An engineering study indicates that J&M has specified erroneous values in response to Item 19, Section V-B of FCC Form 301. Specifically, the predicted distances to the 3.16 mV/m contour for the 90-degree, 135-degree and 180-degree radials have been incorrectly calculated. The difference between the 3 values determined by the Commission and those supplied by the applicant is approximately 25%. This deficiency, however, does not adversely affect J&M's compliance with the Commission's city coverage requirement, using either the Commission's or the applicant's values. However, J&M will be required to provide corrected contour data, a new contour map, and new area and population data to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Other Matters*. Engineering review of the applications of Partnership, California Kool, Highlands, Paso Hondo, J&M, and Cal Tower reveals that these applicants propose to mount their antennas on an existing tower currently used by KMBY(FM), KXDC-FM, KBOQ(FM), KOCN(FM) and KAZU(FM). However, there exists inconsistencies in site elevation, site coordinates, and overall structure height between those set forth by the applicants and that maintained in Commission records. While the discrepancies do not render these applications unacceptable, the applicants will, however, be required to file clarifying amendments with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. The following applicants have petitioned for leave to amend their applications. The accompanying amendment was filed after May 5, 1988, the last date for filing minor amendments as of right.

APPLICANT	DATE(S) OF AMENDMENT(S)
Partnership	November 14, 1989
Flinn	September 7, 1988; October 5, 1988; February 3, 1989; March 1, 1989; August 28, 1989
California Kool	June 27, 1988; December 12, 1988; December 21, 1988; December 22, 1988; January 25, 1989; June 6, 1989; June 7, 1989
Paso Hondo	October 17, 1988; December 5, 1989
J&M	March 13, 1989
Cal Tower	June 27, 1988; May 17, 1989

Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of California Kool.

2. To determine whether California Kool's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether California Kool possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Flinn submit the clarifying amendment set forth in paragraph 2, above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Paso Hondo place its public inspection file within the incorporated community of Carmel in accordance with Section 73.3526(d) of the Commission's Rules and notify the presiding Administrative Law Judge of this location.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Paso Hondo shall submit the Section VI information set forth in paragraph 6, above, in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That J&M submit the clarifying amendment set forth in paragraph 7, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That Partnership, California Kool, Highlands, Paso Hondo, J&M, and Cal Tower submit the clarifying amendments set forth in paragraph 8, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Partnership, Flinn, California Kool, Paso Hondo, J&M, and Cal Tower ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-70

In re Applications of

Monte R. Bitner & Leah R. James d/b/a BITNER - JAMES PARTNERSHIP (hereafter: BJP)	File No. BPH-870227ME
CCI - FM, LTD. (hereafter: CCI)	File No. BPH-870313MO
Benny Workman d/b/a QUINCY COMMUNICATIONS (hereafter: Quincy)	File No. BPH-870313NG
PERFECT FM LIMITED PARTNERSHIP (hereafter: Perfect)	File No. BPH-870313NQ
QUINCY BROADCASTERS, INC. (hereafter: QBI)	File No. BPH-870313NY
UPTOWN BROADCASTING, INC. (hereafter: Uptown)	File No. BPH-870309MD (Previously Returned)

For Construction Permit for a
New FM Station on Channel 274A
in Quincy, Florida

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On August 5, 1988, Uptown's application was returned as not acceptable for filing due to the existence of a transmitter site coordinate discrepancy which could not be resolved confidently and reliably from the face of the application, thereby making it impossible to determine whether Uptown's proposal was in compliance with the Commission's Rules. Uptown filed a Petition for Reconsideration on September 6, 1988, and a Supplement to Petition for Reconsideration on October 12, 1988. Uptown claims that it mailed an amendment correcting the discrepancy on February 27, 1987, prior to the close of the window, and that its application should therefore be accepted for filing. The Commission, however, has no record of ever receiving this amendment. Uptown provides no concrete proof (such as a date-stamped certified mail receipt) that this amendment was ever mailed, and no proof (such as a signed and dated return receipt) that it was ever received by the Commission. Uptown offers only pure speculation that perhaps postal delivery caused the amendment to arrive at the Commission prior to receipt of the application itself, thereby preventing its association with the application. However, even if this conjecture were true, in such a case the amendment would have been returned. Uptown makes no mention of the return of its amendment and Commission files contain no record of the return of the amendment allegedly filed by Uptown. Given Uptown's failure to provide any concrete proof, we deem that it has not adequately established that the amendment in question was either mailed or received. Accordingly, reconsideration is not warranted, and Uptown's Petition for Reconsideration will be denied.

3. In the *Notice of Proposed Rule Making* in MM Docket 87-486, 2 FCC Rcd 6801 (1987), the Commission, at the request of Dolcom Broadcasting, Inc. ("Dolcom"), licensee of WTHZ(FM), Tallahassee, Florida, proposed the substitution of Channel 276C2 for Channel 276A at Tallahassee, Florida, and the modification of Station WTHZ(FM)'s license accordingly, along with the concomitant substitution of Channel 298A for unused-but-applied-for Channel 274A at Quincy, Florida. In the *Report and Order* in MM Docket 87-486, 4 FCC Rcd 5599 (1989), the Commission denied Dolcom's proposal. Dolcom then filed a petition for reconsideration, which is pending. Accordingly, while the applicants for the Quincy allocation will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the disposition of Dolcom's petition for reconsideration.

4. On September 30, 1988, QBI filed an informal objection to Perfect's application. QBI's pleading is essentially a petition to specify issues. The Commission's *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendment of Part 2 of the Commission's Rules*, Report and Order, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases. Thus, ordinarily, we would not consider the matters sought to be raised in the informal objection. Rather, we would afford the party an opportunity to raise the allegations contained therein post-designation pursuant to 47 C.F.R. § 1.229. However, in light of our action below, QBI's informal objection will be dismissed as moot.

5. *BJP*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. BJP has not completed Item 4 correctly. BJP's application gives a post office box number as the residence address for Leah R. James. Accordingly, BJP must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. Monte R. Bitner is general manager of WGWD-FM, Gretna, Florida, and Leah R. James is outside salesman for WTMG-FM, Tallahassee, Florida. These stations are

close enough in proximity to Quincy that the combination of broadcasting interests could violate the Commission's cross-interest policy. However, Bitner and James have indicated their intent to terminate their relationship with WGWD-FM and WTMG-FM, respectively, in the event of grant of the referenced application. Accordingly, in the event of grant of BJP's application, Bitner and James will be required to sever all connections with WGWD-FM and WTMG-FM, respectively, prior to the commencement of program test authority.

7. *CCI*. CCI's application indicates that it is a limited partnership consisting of a general partner, Cory Rodriguez, and 22 limited partners. CCI, however, failed to provide an insulation statement satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985). In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest in or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration Order*, *supra*. In order to ensure compliance with the Commission's multiple ownership rules and cross-interest policy, CCI will be required to file an amendment, either demonstrating that it complies with the *Attribution Reconsideration Order* or listing completely the attributable media interests of its limited partners, with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Quincy*. Quincy is unable to certify that it has sufficient net liquid assets on hand or that sufficient funds are available from committed sources to construct and operate its proposed facility for three months without revenue. Accordingly, an issue will be specified to determine whether Quincy is financially qualified.

9. *Perfect*. Information before the Commission indicates that Perfect was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

10. An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question Perfect's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

11. In Exhibit 3 to its application, Perfect reports that its managing general partner, Sally Todd, is an employee of Holt-Robinson Television, Inc. (Holt-Robinson), licensee of WTWC(TV), Tallahassee, Florida, and of Capital Broadcasting (Capital), licensee of WIWQ(AM) and WWSD(FM), Quincy, Florida. The exhibit fails to specify, however, in what capacity Todd is employed. Since the employment represents a potential violation of the Commission's cross-interest policy, Perfect will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, providing a job description and detailing Todd's positions with Holt-Robinson and Capital. Upon review of the amendment, the Judge will determine whether or not a cross-interest issue is justified.

12. Perfect's application indicates that it is a limited partnership consisting of a general partner, Sally Todd, and a limited partner, Perfect FM Partnership. Perfect, however, failed to provide an insulation statement satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985). In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest in or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration Order*, *supra*. In order to ensure compliance with the Commission's multiple ownership rules and cross-interest policy, Perfect will be

required tc file an amendment, either demonstrating that it complies with the *Attribution Reconsideration Order* or listing completely the attributable media interests of it limited partners, with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. *QBI*. On May 6, 1987, QBI filed an amendment to move its transmitter site 13.9 kilometers. An engineering study of the amendment reveals the facilities proposed (3.0 kilowatts effective radiated power with an antenna radiation center height above average terrain (HAAT) of 103 meters) would exceed the maximum facilities allowed for a Class A station in violation of Section 73.211(b)(1) of the Commission's Rules. QBI indicates in its application that the proposed HAAT is 100 meters (328 feet). Its calculation of the HAAT, however, was based upon an incorrect height for the antenna radiation center above mean sea level (RCAMSL) of 149 meters (489 feet). The correct value for the RCAMSL was derived to be 3 meters higher than this value, or 152 meters. This was derived as follows. First, the ground elevation above mean sea level was derived from Section V-G, Item 5 to be equal to 46 meters (150 feet) by subtracting the overall tower height above ground (110.6 meters) from the overall tower height above mean sea level (156.4 meters). This value can be verified by the transmitter site map (Exhibit 2-E) to also be equal to 46 meters. Then, adding this value to the height of the antenna radiation center above ground (106 meters) specified in Section V-B, Item 6 and the tower sketch (Exhibit 4-E), we find the RCAMSL is equal to 152 meters (498 feet). This conflicts with the value listed in Section V-B, Item 6 of 149 meters (489 feet) which was used in QBI's calculation of the HAAT. Since the actual RCAMSL should read 3 meters higher than the value specified in the application, the HAAT should also be 3 meters higher, or 103 meters, which results in a violation of 47 C.F.R. § 73.211(b)(1). Since the amendment would be in violation of 47 C.F.R. § 73.211(b)(1), it would cause the application, as amended, to be unacceptable for filing and result in the return of the application. However, since the application as originally filed is acceptable for filing, the "suicide" amendment will be returned, and the application as originally filed will be processed. *See Golden Shores Broadcasting, Inc.*, FCC 87-256, released August 13, 1987.

14. *Late - filed Amendments*. BJP, Perfect and QBI have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
BJP	October 11, 1989
Perfect	June 21, 1989; November 22, 1989
QBI	March 15, 1988

15. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by BJP and QBI would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Perfect.

2. To determine whether Perfect's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Perfect possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine, with respect to Quincy, whether the applicant is financially qualified.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by BJP and QBI would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Uptown IS DENIED.

20. IT IS FURTHER ORDERED, That the Informal Objection filed by QBI IS DISMISSED as moot.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, BJP shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge.

22. IT IS FURTHER ORDERED, That, in the event of grant of BJP's application, Monte R. Bitner and Leah R. James will be ordered to divest themselves of all interests in and sever all connections with WGWD-FM and WTMG-FM, respectively, prior to the commencement of program test authority.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, CCI shall submit to the presiding Administrative Law Judge an amendment to its application, in accordance with paragraph 7 hereinabove.

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Perfect shall submit to the presiding Administrative Law Judge amendments to its application, in accordance with paragraphs 11 and 12 hereinabove.

25. IT IS FURTHER ORDERED, That the May 6, 1987 amendment filed by QBI IS HEREBY RETURNED.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by BJP, Perfect and QBI ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 9, 1990

THE COMMISSION ANNOUNCES FOUR POLICY CHANGES IN PROCESSING OF COMMERCIAL FM CONSTRUCTION PERMIT APPLICATIONS FOR NEW FACILITIES

In June 1985, in the *Report and Order* in MM Docket 84-750 (*"Report and Order"*), the Commission adopted new FM "hard look" filing window processing procedures which, among other things, restrict the period of time within which amendments going to the tenderability (*i.e.*, substantial completeness) of applications may be filed.[1] Under these processing procedures, applicants may perfect the tenderability of their applications and retain filing window status only by an amendment filed by the close of the applicable window. Nearly two dozen basic tenderability criteria were specified by the Commission in Appendix D to the *Report and Order*.

The *Report and Order* made no substantive change in existing policy governing acceptability of applications as defined in 47 C.F.R. § 73.3566(a), prior case law and the Commission's *Public Notice* concerning patently defective AM and FM construction permit applications.[2] (If an application is found tenderable, it is then studied for acceptability, which requires compliance with certain statutory and international treaty provisions, as well as technical rules for FM stations.) However, under the "hard look" processing system, an applicant is provided a 30-day period within which to perfect its application's acceptability for filing. This 30-day period is triggered by the application's appearance on a Public Notice as an application accepted for tender. After the period closes, the filing of amendments is severely constrained. [3]

Prior to the time these changes were made, the FM Branch had been returning approximately 40% of the tendered construction permit applications. Many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays in disposing of the flawed applications, in processing problem-free but mutually exclusive applications and in processing unrelated problem-free applications.

The Commission believed that the "hard look" approach would thus yield important benefits. First, the reduction of frivolous and speculative applications would enable us to more rapidly process *all* applications, particularly those tendered by serious candidates who were "ready, willing and able" to rapidly bring service to the public. Second, streamlining our processing procedures would enable us to make more efficient use of our limited staff and other resources in processing large numbers of applications.

To date, the "hard look" processing system has, in large measure, accomplished its originally intended result. Since the institution of the "hard look", the Commission has opened filing windows for a total of 1341 new channels. By January 1, 1990, the staff had processed approximately 5000 construction permit applications filed for these allotments. Significantly, the number of applications for new facilities currently being returned by the staff is approximately 5% of those tendered.

Nevertheless, although the present level of receipt by the Commission of applications for new facilities is estimated to be only 60 per month, approximately 2200 applications remain pending. In a further effort, therefore, to significantly shorten current processing times for the remaining backlog of applications, we are herein announcing four FM processing changes relating to applications for new commercial stations, which the staff is hereby instructed to implement immediately.

1. The first change is procedural and authorizes the staff to issue the required "Notice of Acceptance for Filing" prior to the staff's engineering study of the application. This Notice is mandated by Section 309 of the Communications Act for the purpose of establishing a 30-day period for the filing of petitions to deny. Currently, the Notice is released after the engineering study, and the legal study therefore cannot be completed until the petition to deny pleading cycle has ended. Triggering the statutory petition to deny pleading cycle while applications are still awaiting engineering study will insure that each file is virtually complete before both engineering and legal processing begins. We believe this change will shorten processing time by approximately 45 days per application. We note that if an application placed on public notice as acceptable for filing is subsequently determined to be unacceptable for filing, it may be dismissed as such. *See* 47 C.F.R. § 73.3566.

The other changes, in three factual settings, authorize the staff to waive the FM "hard look" processing rules which prohibit the filing of amendments curing tenderability or acceptability defects after the applicable amendment of right periods. We believe that "hard look" waivers in the three circumstances described below would, at this time, better serve the public interest. Specifically, these waivers would permit the immediate authorization of new service in situations where the defects in question would otherwise bar settlements or grants for applicants and would, therefore, occasion further procedural or administrative delay. These three changes are as follows:

2. In situations where only one applicant has applied in a filing window, the staff will waive the "hard look" rules to permit one opportunity to correct tenderability defects and one opportunity to correct acceptability defects in response to Commission deficiency letters, providing any such amendments do not conflict with a previously filed acceptable application.[4]

3. As to any applicant who proposes to buy out all other applicants in a mutually exclusive group, including any previously dismissed applicant whose

dismissal is not final, the staff will waive the "hard look" rules to permit one opportunity for the surviving applicant to correct all defects in its application, providing such amendment does not conflict with a previously filed acceptable application.

4. As to any applicant previously dismissed for defects whose dismissal is not yet final and who proposes to buy out all remaining applicants in a mutually exclusive group, including any other dismissed applicant whose dismissal is not final, the staff will waive the "hard look" rules in order to permit reinstatement *nunc pro tunc* with a curative amendment for the limited purpose of settlement approval, providing such amendment cures all defects and does not conflict with a previously filed acceptable application.

We believe that waivers of the "hard look" rules in the above limited circumstances will result in significantly improved speed of service to the public. The "hard look" rules will continue to be applied in all other cases.

NOTE: As is the current practice with regard to all applications for new stations not mutually exclusive with another and for proposed settlements which would result in the immediate authorization of new service, cases involving the above three types of waivers will be taken out of line and expedited. However, requests for expedition should *always* be made in writing in order to alert the staff that the case in question falls within one of the above three categories.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] 50 Fed. Reg. 19936 (1985). *See* para. 31 and Appendix D of the *Report and Order*, as well as 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a).

[2] 49 Fed. Reg. 47331 (1984), *recon. denied*, 57 RR 2d 1603 (1985).

[3] These contraints are set forth in 47 C.F.R. § 73.3522(a)(6).

[4] This policy will also apply to any sole applicant whose application has been dismissed on "hard look" grounds, but whose dismissal, at the time the applicant seeks to amend, is not yet final.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-50

In re Applications of

CASHMERE VALLEY BROADCASTERS (hereafter "UVB")	File No. BPH-870904MP
UPPER VALLEY BROADCASTING (hereafter "UVBC")	File No. BPH-870908MB
CASHMERE VALLEY BROADCASTING (hereafter "CVBP")	File No. BPH-870908MP

For Construction Permit
for a New FM Station on Channel 266A
in Cashmere, Washington

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *Environmental.* CVBP is proposing to build a new tower for its antenna. Engineering study indicates that the operation of the new proposal may significantly exceed the radio frequency radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, CVBP is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Since the proposal may have significant environmental impact as defined by 47 C.F.R. § 1.1307(b), Cashmere is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, CVBP will be required to file within thirty days of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. *UVBC.* An engineering study reveals a discrepancy between the 52 meters listed for the antenna height above average terrain (HAAT) in Section V-B, Item 7(b)(3) and the 64 meters HAAT calculated from the average of the eight radials listed in Section V-B, Item 19. This discrepancy does not affect the acceptability of UVBC's application since the use of either value for the antenna height above average terrain does not result in any violation of our technical acceptance rule. However, UVBC will be required to file an amendment correcting the HAAT value in Section V-B, Item 7(b)(3).

5. In addition, UVBC failed to respond to Section V-B, Item 2(a) which requests a description of the exact antenna location. This does not render the application unacceptable since the omitted information is not required to determine technical compliance with the Commission's Rules. However, UVBC will be required to provide a description of the exact antenna location, in addition to the corrected HAAT, to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. If a final environmental impact statement is issued with respect to CVBP, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with National Environmental Policy Act, as implemented by Sections 1.1301-1.1319 of the Commissions's Rules.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, CVBP submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That UVBC submit a description of the exact antenna location and corrected HAAT as specified in paragraphs 4 and 5 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-51

In re Applications of

ROBERT MICHAEL PEPPERCORN (hereafter "Peppercorn") — File No. BPH-880407MY

Y-N-S AIR, INC. (hereafter "YNS") — File No. BPH-880407NF

For Construction Permit
for a New FM Station on Channel 268A
in Gridley, California

HEARING DESIGNATION ORDER

Adopted: February 1, 1990; Released: February 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *YNS.* Information before the Commission indicates that YNS was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve these issues. These unresolved issues call into question YNS's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against YNS in this proceeding.

3. Peppercorn filed an amendment to his application on April 26, 1989. YNS filed amendments to its application on August 17, 1988 and November 16, 1989. The amendments were filed after June 23, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of YNS.

2. To determine whether YNS's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether YNS possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the amendments filed by the applicants in this proceeding ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

American Airlines, Inc.,
Complainant,

v. File No. IC-89-06193

Central Telephone Co. Nevada,
Defendant.

American Airlines, Inc.
Complainant,

v. File No. IC-89-06194

US West, Inc.,
Defendant.

American Airlines, Inc.,
Complainant,

v. File No. IC-89-06195

Pacific Bell and Nevada Bell,
Defendants.

American Airlines, Inc.
Complainant,

v. File No. IC-89-06196

Chesapeake & Potomac Telephone Co.
of Virginia, Chesapeake & Potomac
Telephone Co. of Maryland, and
New Jersey Bell Telephone Co.,
Defendants.

American Airlines, Inc.
Complainant,

v. File No. IC-89-06197

Southern Bell Telephone and Telegraph
Co., and South Central Bell
Telephone Co.,
Defendants.

American Airlines, Inc.
Complainant,

v. File No. IC-89-06198

Diamond State Telephone Co.,
Defendant.

American Airlines, Inc.,
Complainant,

v. File No. IC-89-06199

Southwestern Bell Telephone Co.,
Defendant.

American Airlines, Inc.,
Complainant,

v. File No. IC-89-06200

New York Telephone Co. and New
England Telephone & Telegraph Co.,
Defendants.

and

American Airlines, Inc.,
Complainant,

v. File No. IC-89-06201

Wisconsin Bell, Michigan Bell, and
Ohio Bell,
Defendants.

ORDER

Adopted: February 15, 1990; Released: February 22, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 5 and 6, 1989, American Airlines, Inc. filed informal complaints alleging that the above-captioned defendants were assessing double access charges on calls to foreign exchange numbers in airline reservation networks that are ultimately completed over interexchange carrier-provided 800 service. Defendants have timely answered and generally deny any violation of the Communications Act or the Commission's rules.

2. On January 26, 1989, complainant filed a request for waiver of Section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, pending Commission action on a related proceeding which involves the same basic issues that underlie these complaints. *See Petition of Aeronautical Radio, Inc. For Declaratory Ruling Regarding Double Billing of Access Charges* (filed March 27, 1989) (ARINC Petition).[1] Section 1.718 of the rules provides, *inter alia*, that a complainant will be deemed to have abandoned its informal complaint if a formal complaint is not filed within

six months of the date of the carrier's report. Because the last report in these complaint proceedings was filed on August 28, 1989, complainant could be considered to have abandoned the captioned complaints as of February 28, 1990. The waiver request is unopposed.

3. The "six months" provision of Section 1.718 provides a complainant, whose informal complaint has not been satisfied by the carrier's report, the opportunity to pursue further its claims by filing a formal complaint which might otherwise be barred by the statute of limitations,[2] and provides finality to a controversy within a time certain if no formal complaint is filed. In the instant case, the carriers' reports do not appear to have satisfied the complainant, and Section 1.718 would require the complainant to file formal complaints soon to continue to pursue its claim. However, all parties agree that the ARINC petition involves the same basic issues raised in the complaints.

4. Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, provides that the rules may be waived for good cause. We conclude that, in the instant case, the public purpose would not be served by requiring the complainant to file formal complaints in order to continue to pursue its claim. Therefore, we will grant the requested waiver and will also hold the informal complaints in abeyance pending resolution of the ARINC petition. We intend to resume action on these complaints immediately following action on the ARINC petition.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for waiver of Section 1.718 of the Rules, 47 C.F.R. § 1.718, filed by American Airlines, Inc., IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned informal complaint proceedings be held in abeyance pending further Commission action.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Defendants, in their answers, also have noted that the complaint issues are before the Commission in the ARINC Petition.

[2] 47 U.S.C. § 415.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-296

In the Matter of

Amendment of Section 73.606(b), RM-6635
Table of Allotments,
Television Broadcast Stations.
(Springville, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. At the request of Michael A. Williams (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 5349 (1989), proposing the allotment of UHF TV Channel 67+ to Springville, New York, as the community's first local television service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 67+ can be allotted to Springville in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.8 kilometers (5.5 miles) south to avoid a short-spacing to Channel 60 at St. Catherines, Ontario, Canada, and to the proposed allotment of Channel 62 to Arcade, New York.[1] Canadian concurrence in the allotment has been received since Springville is located within 250 miles of the U.S.-Canadian border. This proposal is not affected by the freeze on new allotments since Springville is not located within the minimum co-channel separation distance to any of the metropolitan areas identified in the Commission's Public Notice. *See Order*, 52 FR 28346, July 29, 1987.

3. We believe the public interest would be served by allotting Channel 67+ to Springville, New York, since it could provide the community with its first local TV service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Springville, New York	67+

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-26-02 and West Longitude 78-38-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-105

In the Matter of

Amendment of Section 73.606(b),	RM-6643
Table of Allotments,	
Television Broadcast Stations.	
(Coos Bay, Oregon)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. At the request of California Oregon Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 3953 (1989), proposing the allotment of UHF TV Channel 41 to Coos Bay, Oregon, as the community's second local television service. Petitioner states that it will apply for the channel, if allotted.[1] No other comments were received.

2. As stated in the *Notice*, Coos Bay is located within the minimum co-channel separation distance (169 miles actual vs. 175 miles required) of Portland, Oregon, which is one of the areas affected by the Commission's freeze on the acceptance of construction permit applications for vacant channels. *See Order*, 52 FR 28346, July 29, 1987. However, petitioner has stated that it has identified a site area 13 kilometers south of Coos Bay which will permit compliance with the Commission's minimum distance separation requirements and the freeze *Order*.

3. We believe the public interest would be served by allotting Channel 41 to Coos Bay, Oregon, since it could provide the comunity with its second local FM service. Channel 41 can be allotted to Coos Bay in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.2 kilometers (7.6 miles) south.[2] Any application which is filed for this channel which does not specify at least a 175 mile separation to Portland, Oregon, may not be accepted for filing if the Commission's freeze on such applications is still in effect.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Coos Bay, Oregon	23+, 41

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were late-filed but accompanied by a request for their acceptance. We will accept the comments for the purpose of expressing continuing interest, since the proposal is uncontested.

[2] The coordinates for this allotment are North Latitude 43-16-00 and West Longitude 124-16-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-53

In the Matter of

Amendment of Section 73.202(b), RM-6614
Table of Allotments,
FM Broadcast Stations.
(Salem and Sioux Falls, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. At the request of Big Sioux Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 2198 (1989), proposing the substitution of Channel 263C1 for Channel 263C2 at Salem, South Dakota, and the modification of its construction permit for Station KSML to specify operation on the higher powered channel.[1] In addition, the *Notice* proposed the substitution of Channel 252A for Channel 261A at Sioux Falls, South Dakota, and the modification of Station KCFS' license accordingly. Petitioner and Sioux Falls College ("SFC"), licensee of Station KCFS, filed comments. Petitioner filed reply comments.

2. SFC reiterates the opposing arguments it had previously presented, as discussed in the *Notice*. It again states its belief that public confusion would result if Station KCFS were to change its channel of operation for the second time in less than a year. Further, it claims that petitioner's request for an upgraded facility at Salem represents only a desire to serve the larger community of Sioux Falls. It goes on to state that the Salem station, with its present Channel 263C2 facilities, already will put a "decent" signal over Sioux Falls. However, it then states that the signal from Station KCFS at Sioux Falls on Channel 261 "would capture the discriminator in most FM receivers, making it impossible to receive the signal from the Salem station." Therefore, SFC argues that the purpose of the rule making request is not an attempt to expand service to Salem but rather to force SFC to vacate its present channel. SFC also again argues that it is not economically feasible to construct a Class C1 facility to serve the small community of Salem. Therefore, it submits that the petitioner should be required to demonstrate that it has the requisite financial resources to construct the requested facilities. Finally, if the Commission should decide that the public interest would be served by adopting the proposed channel changes, SFC requests that Station KCFS's license be modified to specify operation on Channel 252C3 instead of Channel 252A. Such reclassification, according to SFC, would enable it to expand and improve the station's facilities at a future time. Further, if Channel 252 is reclassified as a Class C3, SFC states that it could operate on the new channel using essentially the same equipment which it presently uses on Channel 261. SFC states that while petitioner is required to reimburse the licensee for the cost of changing channels, it would not be expected to pay the costs of any increase in power.

3. Petitioner reiterates its intention to apply for Channel 263C1, if allotted to Salem. It also states that it will reimburse SFC for the reasonable costs associated with the change in channel for Station KCFS. Petitioner states that upgrading the Salem station serves the public interest since it would result in the most efficient use of the spectrum. Petitioner submits that its request to substitute channels at Sioux Falls is not a result of any reception problems but is required because of the Commission's minimum distance separation requirements. It notes that Channel 263C1 cannot be allotted to Salem in compliance with these rules if Channel 261A remains allotted to Sioux Falls. Petitioner further opposes the request of SFC that the Commission require financial information, stating that it is established law and policy that such issues are not appropriately addressed in the context of a rule making proceeding. Finally, petitioner argues that SFC's proposal to modify Station KCFS to Channel 252 as a Class C3 is untimely. Although the *Report and Order* establishing Class C3 stations was released prior to the comment deadline in this proceeding, April 27, 1989, the new rules did not become effective until June 1, 1989. Therefore, it argues that SFC's proposal is unacceptable as a counterproosal in this proceeding.

4. After carefully reviewing the pleadings before us, we believe that the public interest would be served by substituting Channel 263C1 for Channel 263C2 at Salem, South Dakota, modifying Station KSML's construction permit accordingly, substituting Channel 252A for Channel 261A at Sioux Falls, South Dakota, and modifying Station KCFS's license accordingly, since it could enable Station KSML to expand its coverage area. We find that SFC has not raised a substantial and material question of fact which would require a hearing on the proposed modification. As the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of new or expanded service at another community. *See, e.g., Marietta, Ohio, and Ravenswood, WV*, 2 FCC Rcd 4681 (1987) and *Albany, NY et al.*, 2 FCC Rcd 4300 (1987). In accordance with Commission policy, the petitioner is required to reimburse SFC for the reasonable costs associated with the change in channel for Station KCSF. However, we do not believe it appropriate to require the petitioner to demonstrate any financial ability to construct a station on Channel 263C1 in connection with the rule making. Petitioner has stated that it will apply for and construct the new facilities, if granted, and reimburse SFC for the reasonable costs associated with its change of channel. SFC provides no substantiation that the petitioner cannot or will not honor its commitment, beyond the bald statement that it is not economically feasible to construct such a high powered station at Salem. We further find no merit to SFC's contention that the purpose behind the rule making was to remove KCFS from Channel 261 in order to resolve a receiver discrimination problem. Rather, Channel 263C1 cannot be allotted to Salem in compliance with the Commission's minimum distance separation

requirements unless Channel 261A is removed from Sioux Falls. Finally, we will not allot Channel 252 to Sioux Falls, for use by Station KCFS, as a Class C3. First, the request is untimely since it was filed prior to the effective date of the rules. Second, the request violates Commission policy in that SFC failed to state an intention to apply for the channel, if allotted. Rather, it states that the allotment "could enable the College to expand and improve the facilities of Station KCFS *at a future time, when monies become available for that purpose from either the NTIA or other funding sources.* " (Emphasis supplied) *See, Meeker, Colorado*, 4 FCC Rcd 7792 (1989); *Imboden, Arkansas*, 4 FCC Rcd 7793 (1989); and paragraph 2 of the Appendix to all Notices of Proposed Rule Making.[2]

5. Channel 263C1 can be allotted to Salem and Channel 252A can be allotted to Sioux Falls in compliance with the Commission's minimum distance separation requirements and the channels can be used at the presently authorized facilities of Stations KSML and KCFS, respectively. [3]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Salem, South Dakota	263C1
Sioux Falls, South Dakota	223C, 243C, 247C1, 252A, 270C2, 279C2, 284C

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the permit of Big Sioux Broadcasting, Inc., for Station KSML, Salem, South Dakota, IS MODIFIED to specify operation on Channel 263C1, in lieu of Channel 263C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KCFS, Sioux Falls, South Dakota, IS MODIFIED to specify operation on Channel 252A in lieu of Channel 261A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KCFS's license, BLED-880817LL, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLED-880817LL, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows: Sioux Falls College, 1501 South Prairie Avenue, Sioux Falls, South Dakota 57105.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The construction permit has been assigned from Rayfield Crume, the original petitioner in this proceeding, to Big Sioux Broadcasting, Inc.

[2] We also note that SFC's belief that it could increase power to Class C3 may be affected by the Commission's action, taken subsequent to its comments, increasing maximum Class A power to 6 kW. *See* 4 FCC Rcd 6375 (1989). This action also increased the minimum power for Class C3 stations to 6 kW.

[3] The coordinates for Channel 263C1 at Salem are North Latitude 43-29-18 and West Longitude 97-26-34. The coordinates for Channel 252A at Sioux Falls are North Latitude 34-31-57 and West Longitude 96-44-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-46

In the Matter of

Amendment of Section 73.202(b), RM-7145
Table of Allotments,
FM Broadcast Stations.
(Ketchum, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by LeeMay Broadcasting Company, Inc. (petitioner), requesting the substitution of Channel 298C1 for Channel 298C2 at Ketchum, Oklahoma, and the modification of its license for Station KGND to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 298C1 can be allotted to Ketchum in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.5 kilometers (29.5 miles) northwest to avoid a short-spacing to Stations KAYI, Channel 295C, Muskogee, Oklahoma, KMOQ, Channel 296A, Baxter Springs, Kansas, and KLMK, Poteau, Oklahoma, and to accommodate petitioner's desired transmitter site.[1] Petitioner states that it is also the permittee of a new station on Channel 281A at Fredonia, Kansas (BPH-881024MC). Recognizing that the allotment of Channel 298C1 to Ketchum would result in prohibited overlap between the two stations, petitioner states that it will file an application to relocate the transmitter of the Fredonia station so as to avoid prohibited overlap of the 3.16 mV/m contours of the two stations, if the channel substitution proposed herein is granted.

3. We believe the public interest would be served by proposing the substitution of Channel 298C1 for Channel 298C2 at Ketchum, Oklahoma, since it could permit Station KGND to expand its coverage area. As requested, we also propose to modify petitioner's license for Station KGND to specify operation on the higher powered channel. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Ketchum. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ketchum, Oklahoma	298C2	298C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 16, 1990,** and reply comments on or before **May 1, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bob May, Vice President and General Manager
LeeMay Broadcasting Company, Inc.
P.O. Box 419
Vinita, Oklahoma 74301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 36-46-33 and West Longitude 95-27-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-612

In the Matter of

Amendment of Section 73.202(b),	RM-6485
Table of Allotments,	RM-6727
FM Broadcast Stations.	
(Three Oaks and Bridgman,[1] Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 751 (1989), proposing the allotment of FM Channel 248A to Three Oaks, Michigan, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by John Keeley (petitioner). Petitioner filed comments restating his interest in Channel 248A at Three Oaks. Bridgman Broadcasting filed a counterproposal.[2] Petitioner filed reply comments.

2. In its counterproposal, Bridgman Broadcasting requests the allotment of FM Channel 248A to Bridgman, Michigan, as that community's first FM broadcast service. In support of its request, Bridgman Broadcasting states that Bridgman is a city with a 1980 U.S. census population of 2,235, whereas Three Oaks is a village of 1,774. According to Bridgman Broadcasting, a channel in Bridgman will provide reception service to a larger audience and provide a first transmission service to the larger community. Bridgman Broadcasting stated its intention to promptly construct a station at Bridgman if awarded the permit.

3. In reply comments, petitioner disputes Bridgman Broadcasting's statement that a channel at Bridgman would provide service to a larger population. Petitioner questions the method and information used to conduct Bridgman Broadcasting's study. Petitioner argues that the difference in population between the two communities of 461 is hardly a distinction on which to allot the channel to Bridgman, and instead requests we accept its engineering study demonstrating that a larger population will be served if the channel is allotted to Three Oaks. Petitioner's engineering study states that 113,945 persons will be served if the channel is allotted to Three Oaks and 113,875 if at Bridgman, a difference of 70 persons. Petitioner also makes reference to a growing part-time population of tourists and vacationers at Three Oaks but does not provide figures on which to base a comparison.

4. A review of the proposals indicates that Bridgman and Three Oaks are both deserving of an FM channel. In an effort to provide each community with its first local service, the staff performed a search to determine if alternate channels were available. The study indicates that Channel 248A is the only channel that can be allotted to either community. Our study also indicated that the allotment of Channel 248A to Bridgman or Three Oaks will provide 1 mV/m or better service to both communities. Our decision is guided by the allotment priorities as set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). These priorities are:

(1) First full-time aural service;
(2) Second full-time aural service;
(3) First local service; and
(4) Other public interest matters.
[Co-equal weight given to priorities (2) & (3)].

The allotment of Channel 248A to Bridgman or Three Oaks would provide a first local service to either community, fulfilling priority (3). Therefore, our decision must be based on priority (4) - other public interest factors. In this regard, we find that the incorporated community of Bridgman (population 2,235) [3] has a larger population than Three Oaks (population 1,774). We also find that Three Oaks receives service from six FM signals, ten day time AM signals and five night time AM signals, while Bridgman receives service from five FM signals, 12 day time AM signals & 5 night time AM signals. While we agree with the petitioner that a difference in population of approximately five hundred between the two candidate communities is extremely small, and justifies consideration of other factors, we note that our own analysis and the evidence submitted by the petitioner indicate that on any other conceivable and documented evidentiary basis for a decision, the proposals are even less distinguishable. Thus, we believe that the public interest would be served by allotting Channel 248A to Bridgman, since it has the larger population. *See Clarksville and Lanesville, Indiana*, 4 FCC Rcd 4968 (1989); *Roswell, Georgia*, 2 FCC Rcd 2775 (1987).

5. A staff engineering analysis has determined that Channel 248A can be allotted to Bridgman, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[4] Since the community of Bridgman is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained for this allotment.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bridgman, Michigan	248A

7. The window period for filing applications will open on **April 10, 1990,** and close on **May 10, 1990.**

8. IT IS FURTHER ORDERED, That the petition for Rule making filed by John Keeley (RM-6485) requesting the allotment of Channel 248A to Three Oaks, Michigan, IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Bridgman has been added to the caption.

[2] Public Notice of the counterproposal was given on April 20, 1989, Report No. 1776 (RM-6727).

[3] All population figures are taken from the 1980 census.

[4] The coordinates for Channel 248A at Bridgman are 41-56-36 and 86-33-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-106

In the Matter of

Amendment of Section 73.202(b),	RM-6568
Table of Allotments,	RM-6888
FM Broadcast Stations.	
(Weston and Webster Springs,	
West Virginia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1990; Released: February 22, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 3955 (1989), issued at the request of Stonewall Broadcasting Corporation (petitioner), proposing the substitution of Channel 272B1 for Channel 272A at Weston, West Virginia. The *Notice* also proposes to modify the petitioner's license for Station WSSN(FM) at Weston to specify the higher class co-channel. In response to the *Notice*, Delores Swann ("Swann") filed comments and a counterproposal seeking the allotment of Channel 271A to Webster Springs, West Virginia, as that community's first local FM service.[2] Petitioner failed to file initial comments reiterating an interest in its station's upgrade as required by the *Notice* at paragraph 6. However, petitioner filed reply comments addressing the counterproposal and restating its interest in the upgrade. [3]

2. Petitioner, in its reply comments, identifies several alternative channels that are available for use at Webster Springs to eliminate the conflict between the two proposals.

3. Our engineering analysis has confirmed that there are at least ten channels available for allotment at Webster Springs. Therefore, we need not compare the communities before reaching a decision in this case. Channel 262A can be allotted to Webster Springs in compliance with the Commission's minimum distance separation requirements.[4] Channel 272B1 may also be allotted to Weston consistent with the Commission's minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) east of that community.[5] We shall modify the license of Station WSSN(FM) at Weston to specify operation on Channel 272B1 in lieu of Channel 272A, as requested, in accordance with Section 1.420(g).

4. In view of the fact that Weston and Webster Springs are located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner and prospective applicants for Channel 262A at Webster Springs are required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

5. We believe the public interest would be served by the allotment of Channel 262A to Webster Springs, West Virginia, as that community's first local FM service and the allotment of Channel 272B1 to Weston, as a first wide coverage area FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Weston, West Virginia	272B1
Webster Springs, West Virginia	262A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Stonewall Broadcasting Corporation for Station WSSN(FM) at Weston, West Virginia, IS MODIFIED, to specify operation on Channel 272B1 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing applications on Channel 262A at Webster Springs, West Virginia, will open on **April 10, 1990,** and close on **May 10, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Webster Springs, West Virginia, has been added to the caption.

[2] Public Notice of the counterproposal was given on July 17, 1989, Report No. 1786.

[3] The petitioner has not provided a justification for its failure to file initial comments. Ordinarily, this would require dismissal of petitioner's request, since there is a conflicting request on file. However, because petitioner's late comments provide a means for resolving the conflict and expediting service to both Weston and Webster Springs, we shall accept the petitioner's reply comments as a late-filed expression of continuing interest in obtaining the upgrade at Weston in accordance with Section 1.415(d) of the Commission's Rules.

[4] The city reference coordinates for Channel 262A at Webster Springs are 38-28-42 and 80-24-54.

[5] The restricted site coordinates are 39-00-00 and 80-20-00, as specified by the petitioner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the

National Exchange Carrier Association
December 29, 1989 Proposed Revision to
the Average Schedule Formula
and Other Average Schedule Issues

ORDER

Adopted: February 12, 1990; Released: February 14, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Payments to average schedule companies from interstate revenue pools administered by the National Exchange Carrier Association, Inc. ("NECA") are made in accordance with a formula approved by the Commission.[1] NECA is required to submit "a proposed revision of the formula for each annual period . . . or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before December 31 of the preceding year."[2] On December 29, 1989, NECA filed proposed revisions to the average schedule formula with an effective date of July 1, 1990.[3] Parties seeking changes to the average schedule formula proposed by NECA for the period beginning July 1, 1990 and concluding June 30, 1991 are to file comments by March 5, 1990 and replies by March 19, 1990. Any average schedule company seeking transitional or other supplemental payments in addition to those proposed by NECA should include such requests in comments to be filed on or before March 5, 1990.[4] In addition, any party wishing to raise any matter concerning disbursements, by NECA, to average schedule companies for the period from May 31, 1990 through June 30, 1991 should do so in this proceeding.

II. NECA'S PROPOSED AVERAGE SCHEDULE FORMULA

2. NECA proposes a monthly settlement per common access line of $12.433867 - ($.014876)(access lines per exchange) for exchanges with fewer than 385.554541 access lines. In the case of exchanges with 385.554541 access lines or more, NECA proposes a settlement of $6.6698135 for each access line. In both cases, settlements would be adjusted to reflect the pooled rate of return based on a common line factor equal to .595399 + (3.371674)(ROR). NECA expects that these modifications will result in aggregate common line formula reductions of 4.17 percent.[5]

3. NECA proposes a settlement per minute for traffic sensitive central office functions equal to $.029183 + ($184.953284 divided by access minutes per exchange). For intertoll switching, NECA proposes a monthly settlement per trunk of $28.17. For distance sensitive line haul, NECA proposes a monthly settlement of ($1.124768)(interstate circuit miles) + ($.001500)(traffic sensitive switched minutes). With respect to the "Line Haul Non Distance-Sensitive" category, NECA proposes a settlement for each interstate circuit termination of $32.87, and, for special access, a settlement equal to .936639 times the exchange carrier's special access revenues. All traffic sensitive settlements under NECA's proposal would be adjusted to reflect the pooled rate of return on the basis of a factor that is equal to .635825 + (3.034791)(ROR). NECA expects that those modifications will result in traffic sensitive formula reductions of 3.19 percent.[6]

4. In addition to common line and traffic sensitive settlement schedules, NECA has also proposed settlement schedules for the following services: CABS and administrative expenses, equal access implementation, interim 800 NXX translation services, and Signaling System 7 services. For these services, the NECA proposed monthly settlement is: (1) $371.54 + ($.000468)(total access minutes) for CABS and administrative expenses; (2) "the interstate portion of initial incremental equal access expenses paid in the month in which they are incurred" plus .0238 times the interstate portion of initial incremental equal access investment for equal access implementation; and (3) interim 800 NXX translation service revenues less uncollectibles for interim 800 NXX translation settlements.[7] For Signaling System 7 compensation, NECA proposes a monthly payment of $326 for each central office with signal point equipment in service and $1252 per month for each central office with Signaling System 7 switching in service.[8]

III. ADDITIONAL ISSUES

A. Supplemental Transition Payments

5. In response to NECA's first average schedule filing, the Commission approved a plan that included transition payments for certain average schedule companies that terminate on May 31, 1990.[9] In the filing proposing that transition, NECA stated that further study would be required to determine if additional transitional relief would be required after that date. On August 16, 1989, NECA filed a Report stating that the transition plan had accomplished its objective, and concluding that there is no need for the transition plan to be extended beyond its scheduled expiration date. That NECA Report stated that "the expiration of the overall . . . transition plan does not necessarily preclude the possibility of individual relief for companies in particularly compelling circumstances."[10] NECA subsequently forwarded to the Chief, Common Carrier Bureau, statements from four average schedule companies seeking additional transition payments.[11] National Utilities, Inc. and ICORE also filed separate requests for supplemental payments.[12]

6. The *Transition Plan Order* denied the ICORE petition and dismissed the National Utilities petition. That order said that National may seek relief in pleadings filed in response to average schedule revisions NECA files on or before December 31, 1989 and that "[a]ny other average schedule company seeking supplemental payments or any other modification of the revisions submitted by NECA should present its views in the context of that proceeding." *Id.* at para. 10. If any of the four companies that submitted statements to NECA wish to pursue requests for

supplemental payments, such requests should be presented as suggested modifications of the proposed NECA plan in comments filed on or before March 5, 1990.

B. Consolidated Petition For Reconsideration

7. On June 14, 1989, the Consolidated Telephone Company ("Consolidated") filed a petition requesting reconsideration of certain portions of the Order approving the revisions to the average schedule formula that became effective April 1, 1989.[13] Consolidated requested transition relief in addition to that provided in the approved plan, stating that the relief granted is insufficient in light of the reductions in its line haul settlements. Consolidated also criticized NECA's line haul formula for failing to approximate the costs of average schedule companies with low line haul usage. As a consequence, Consolidated requested that the Commission's Common Carrier Bureau order NECA "to begin working on revisions to the distance sensitive line haul formula that will take into consideration the issues raised herein and in Consolidated's previous pleadings."[14] In opposing Consolidated's petition, NECA stated that it was committed to performing the studies that Consolidated had suggested, that it would discuss study methodologies with Consolidated, and that it would keep Consolidated informed of the study results.[15]

8. In its December 29, 1989 filing, NECA describes the studies that it undertook at the request of, and in cooperation with, Consolidated.[16] NECA states that its statistical tests

> reveal that the current line haul formula structure estimates well the actual line haul costs of these cost companies. The tests also show that other formula structures could work approximately as well. They do not indicate that a new formula structure would be superior to the current structure.[17]

As a consequence, NECA did not change the settlement variables that were contained in the line haul portion of the average schedule formula.[18] NECA did state, however, that it will continue to study alternative variables on the basis of a larger data base that it is collecting and that those data will be evaluated prior to the next average schedule formula filing.[19]

IV. DISCUSSION

9. For purposes of administrative efficiency, we have decided to consolidate our consideration of the NECA plan for the period commencing July 1, 1990, and any proposed modifications of that plan and our consideration of the Consolidated petition for reconsideration. We believe that this procedure will improve administrative efficiency since NECA has, in response to Consolidated's reconsideration requests, performed an additional line haul study in consultation with Consolidated[20] and now proposes to continue use of the independent variables for line haul settlements to which Consolidated had previously lodged objections.[21] Persons who wish to submit additional information or arguments relating to the Consolidated petition may include such information or arguments in pleadings filed in response to the proposed average schedule revisions.

V. ORDERING CLAUSES

10. ACCORDINGLY, pursuant to Sections 0.91, 0.291, and 1.1 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.1, IT IS ORDERED that comments on the average schedule revisions proposed by NECA to become effective July 1, 1990 SHALL BE FILED not later than March 5, 1990. Reply comments SHALL BE FILED on or before March 19, 1990.

11. IT IS FURTHER ORDERED that parties SHALL FILE five copies of their comments and reply comments with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C., 20554. Two copies of all filings are to be filed with Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554 and with the Commission's contractor for public service records duplication, International Transcription Services, Inc. ("ITS"), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. All comments and reply comments shall be captioned "In the Matter of National Exchange Carrier Association December 29, 1989 Proposed Revisions to the Average Schedule Formula and Other Average Schedule Issues." Copies of NECA's 1990 Average Schedule filing and the comments and reply comments filed in this proceeding may be obtained from ITS at (202)-857-3800. The record in this proceeding is also available for public inspection and duplication in Room 544, 1919 M Street, N.W., Washington, D.C.

12. IT IS FURTHER ORDERED that for the purpose of *ex parte* communications, this proceeding will be treated as a non-restricted proceeding that is subject to the provisions of Sections 1.1206(a)(1)-(5) of the Commission's rules, 47 C.F.R. § 1.1206(a)(1)-(5)(1988).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 69.606(a).

[2] 47 C.F.R. § 69.606(b) *as revised in* Access Tariff Filing Schedules, 3 FCC Rcd 5495, 5500 (1988).

[3] NECA 1990 Modification of Average Schedules at 1 (filed Dec. 29, 1989) and Errata (filed Jan. 16, 1990) ("1990 Average Schedule Filing").

[4] In this proceeding we will also consider Consolidated's Petition for Reconsideration of the Commission's decision concerning the average schedule formula that became effective April 1, 1989. Consolidated Telephone Company Petition For Reconsideration (filed June 14, 1989)("Consolidated petition"). *See also* Consolidated Reply (July 7, 1989). *See, generally*, Revisions to the Average Schedules Proposed by NECA, 4 FCC Rcd 2804 (Com. Car. Bur. 1989)(" *1989 Average Schedule Revisions Order").*

[5] *Id.* at ii, I-12 to 1-14; NECA Errata (Jan. 16, 1990).

[6] *Id.* at ii, I-13 to I-15.

[7] 1990 Average Schedule Filing at I-15 to I-16. NECA states that its interim 800 translation settlements proposal is unchanged from last year. *Id.* at I-16. *See also id.* at Section VIII, NECA Modification of Average Schedules at VIII-104 (Oct. 3, 1988).

[8] 1990 Average Schedule Filing at I-16.

[9] *See, generally*, NECA Study of ARPM Transition Plan and Petition of National Utilities, Inc. For Relief For High Cost Average Schedule Companies in Alaska, DA 89-1656, at para. 8 and note 27 (Com. Car. Bur.Dec. 27, 1989)(" *Transition Plan Order* "); MTS and WATS Market Structure: Average Schedule Companies, 103 FCC 2d 1017, 1025-26, 1029 (1986).

[10] NECA Report In the Matter of NECA Study of ARPM Transition Plan (Aug. 16, 1989) at 4.

[11] Letter from Mr. J. R. Naset, NECA Vice President - Industry Relations, to Dr. Gerald Brock, Chief, Common Carrier Bureau (Aug. 16, 1989).

[12] Petition of National Utilities, Inc. for Relief For High Cost Average Schedule Companies in Alaska (Oct. 27, 1989). National also requested consideration of a special multiplier factor for high cost average schedule companies in Alaska. *Id.* at 1. Petition of the ICORE Companies To Strike, or In The Alternative For Formal Notice and Comment Rule Making Procedures (Sept. 26, 1989). In that petition, ICORE argued that the 1986 transition plan did not terminate on May 31, 1990. *Id.* at 3. *See, generally, Transition Plan Order supra*, note 9.

[13] Consolidated Telephone Company Petition For Reconsideration (filed July 7, 1989).

[14] *Id.* at 17.

[15] NECA Opposition To Consolidated Telephone Company's Petition For Reconsideration at 1-2 (June 27, 1989)("NECA Opposition").

[16] *Id.* at I-9, IX-1 to IX-42.

[17] *Id.* at IX-31.

[19] *Id.* at I-9, I-13 to I-14. As noted above, although NECA continued to use the same settlement variables that it proposed on October 3, 1988, NECA proposes to change the values of the coefficients that are associated with those variables. *Id.* at I-13 to I-14.

[20] *Id.* at I-9 to I-10.

[21] *See* 1990 Average Schedule Filing at ii, I-8 to I-10, IX-1 to IX-42.

[22] *Id.* at I-13 to I-14, Consolidated petition, *passim*.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-64

In the Matter of

Regulations Concerning Indecent
Communications by Telephone

NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1990; Released: February 13, 1990

By the Commission:

INTRODUCTION

1. This *Notice of Proposed Rule Making* (*NPRM*) solicits comments on regulations the Commission may adopt pursuant to Section 223 of the Communications Act of 1934, as amended, 47 U.S.C. § 223.[1] Section 223, *inter alia*, imposes penalties on those who knowingly make obscene communications by telephone for commercial purposes and on those who knowingly make indecent communications by telephone for commercial purposes to persons under 18 years of age or to adults without their consent. The section requires telephone companies, to the extent technically feasible, to prohibit access to indecent communications from the telephone of a subscriber who has not previously requested access. The section also establishes that it is a defense to prosecution where the defendant restricts access to the prohibited indecent communications to persons 18 years of age or older by complying with such procedures as the Commission may prescribe by regulation. *See* Sections 223(b) and (c), 47 U.S.C. §§ 223(b) and (c).[2] The rules we propose to adopt, and now seek comment on, are attached as Appendix B.

BACKGROUND

2. The Commission has promulgated rules in response to legislation concerning "dial-a-porn" services on three occasions. In 1983, Section 223(b) of the Act was amended to make it unlawful, *inter alia*, to transmit to any person under 18 years of age obscene or indecent messages by means of a telephone or any telephone facility. [3] Section 223(b)(2) then provided that it would be a defense to prosecution if the provider of adult messages restricted access to the prohibited messages to adults in accordance with procedures established by the Commission. In the *First Report and Order*, Gen. Docket No. 83-989, 49 Fed. Reg. 24,996 (1984), the Commission determined that the adult message provider would have a defense to prosecution if it operated only between the hours of 9:00 PM and 8:00 AM Eastern Time, or required payment by credit card prior to transmission of the message. In *Carlin Communications, Inc. v. FCC (Carlin I)*, 749 F.2d 113 (2d Cir. 1984), the court invalidated this time of day restriction, finding that the Commission had rejected alternatives that might be equally effective and less restrictive.

3. In a *Second Notice of Proposed Rule Making* in Docket 83-989, 50 Fed. Reg. 10,510 (1985), the Commission solicited comments on four alternative approaches of restricting access by minors to adult message services: screening and blocking, access and identification codes, limiting operation hours of service, and billing notification. In its *Second Report and Order*, 50 Fed. Reg. 42,699 (1985), the Commission concluded that the most effective means of restricting access by minors to adult message services, while at the same time minimizing restrictions on the rights of adults, was to require dial-a-porn message providers to transmit messages only to callers using an access code or personal identification number available only to adults, or to require payment by credit card before transmission of the adult message.[4]

4. In response to appeals by two affiliated adult message providers operating in New York Telephone Company territory, the Court of Appeals for the Second Circuit stated that under the standard enunciated in *Carlin I* it was "not yet convinced that the regulation was chosen with the appropriate constitutional strictures in mind..." *Carlin Communications, Inc. v. FCC (Carlin II)*, 787 F.2d 846, 847 (2d Cir. 1986). The court further stated that the access code regulation was clearly arbitrary and capricious with respect to areas served by the New York Telephone Company because the public announcement system provided by that carrier was a one-way, non-interactive system, making it infeasible to implement an access code system. (A two-way capability is necessary for implementation of an access code system in order for the caller to transmit to the information provider his personal identification number.) The court stated that its decision applied only to Carlin and the New York Telephone Company system. The access code regulation was therefore left in effect in other areas of the country.[5]

5. In response to *Carlin II*, the Commission issued its *Third Notice of Proposed Rule Making*, 51 Fed. Reg. 26,915 (1986). The Commission solicited comment on methods of implementing an access code system in the New York Telephone Company service area. The Commission requested comment on the possibility of implementing access codes without two-way communication between the information provider and customer and also on using New York Telephone Company facilities at its Varick Street station which were apparently modifiable in ways to create a two-way capability.

6. In the *Third Report and Order*, 52 Fed. Reg. 17,760 (1987), the Commission promulgated its third set of regulations. The new rules added message scrambling to the prior defenses of credit card payment and use of access codes. Under this arrangement, adult program providers would scramble their messages; sale of decoders would be only to adults. Adult program providers offering adult message services using mass announcement services tariffed at the FCC were required to request that carriers providing such services identify calls in bills to customers. In *Carlin Communications Inc. v. FCC (Carlin III)*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S._____, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988), the court held that the new regulations, which included access codes, credit card payments and scrambled messages as defenses to prosecution under Section 223(b) for dial-a-porn providers, were a "feasible and effective way to serve" the "compelling state interest" in protecting minors. 837 F.2d at 555. The court directed the Commission to reopen proceedings if a

less restrictive technology became available. However, the court held that Section 223(b) could not constitutionally be applied to nonobscene speech. *Id.* at 560, 561.

7. Congress then amended Section 223(b) of the Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. Pub. L. 100-297, 102 Stat. 424, April 28, 1988. This statutory amendment eliminated the requirement that the Commission promulgate regulations for restricting access to minors because a total ban was imposed on all obscene and indecent dial-a-porn services.[6]

8. In *Sable Communications of California, Inc. v. FCC (Sable)*, 109 S.Ct. 2829 (1989), the United States Supreme Court upheld the ban in newly amended Section 223(b) on obscene telephone transmissions, but struck down the part of the statute that applied to indecent messages. The Court observed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S.Ct. at 2836. The Court also noted that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2836, 2839. The Court stated that:

> [T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors.

Id. at 2838. Referring to the FCC regulations adopted under the previous statute, the Court added:

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

Id. at 2838-39 (footnote omitted).

9. Current Section 223 of the Act continues the outright ban on obscene communication for commercial purposes, but regulates (rather than prohibits) indecent telephonic communication for commercial purposes. Section 223(c) requires, with certain exceptions, that carriers block access to dial-a-porn services unless requested by a subscriber in writing to provide access. In addition, the legislation extends the criminal penalties for both obscene and indecent telephonic communications to persons under 18 to intrastate as well as interstate communications. Most significantly, for present purposes, Section 223(b) re-establishes an affirmative defense to prosecution for providers of indecent services that comply with Commission regulations.

DISCUSSION

10. Section 223(b)(3) now states that:

> It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older *in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.*

(Emphasis added.) Under the *Sable* decision, the Commission's regulations must be "the least restrictive means to further the articulated interest," in this case, the restriction of access by children to dial-a-porn services. The regulations must be "carefully tailored" or "narrowly tailored" to achieve the regulatory purpose. 109 S.Ct. at 2836, 2839.[7]

11. We believe that the set of alternative options reflected in the *Third Report and Order* represent, under current technology, the most carefully tailored and least restrictive procedures available, consistent with the requirements expressed by the Court in *Sable*.[8] Referring to the regulations adopted in the *Third Report and Order*, the Court stated:

> The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a "feasible and effective" way to serve the Government's compelling interest in protecting children. 837 F.2d at 555.

109 S.Ct. at 2837, quoting *Carlin III*. Thus, by this Notice, we propose to re-adopt the regulations of the *Third Report and Order*, and require that, in order to have a defense against a prosecution under Section 223 for providing indecent material, a provider utilize access codes, credit cards or scrambling, and, where applicable, carrier billing notification. *See supra* para. 6. We seek comment on this proposal, including the effectiveness, feasibility and need for the billing notification requirement in proposed subsection (d) in light of intervening statutory, regulatory or market changes. Additionally, parties are asked to offer alternatives, including technological advances and new telephone company service offerings, with full discussion of the related costs and benefits of each alternative, in conjunction with and independent of the options proposed herein.

12. We find one additional requirement may be useful in implementing the blocking procedure mandated by Section 223(c). Section 223(b)(3) appears to require that dial-a-porn providers notify their carrier of the nature of the communications they intend to offer. Requiring dial-a-porn providers to inform the carrier that offers them the commercial service described in Section 223(c)(1) appears to impose on them a minimal burden, and would facilitate implementation of blocking by carriers. We seek comment on this proposal.

CONCLUSION

13. The proposals set forth in Appendix B hereto represent what we believe are narrowly tailored procedures that restrict access to dial-a-porn services by minors, consistent with the intent of Congress in Section 223 of the Act and the guidance of the Supreme Court in *Sable*. Interested parties are invited to comment on these proposals, on the discussion above and on any other matters relevant to Section 223 and regulations the Commission should implement pursuant to subsection (b)(3) of that section. Commenters are requested to offer specific language for any additional or alternative regulations they believe would better achieve the goals of Congress and to explain how such rules are consistent with the intent of Congress and the Court. In view of the history of dial-a-porn legislation over the past several years, it is especially important that commenters, including telephone companies and service providers, include cost/benefit analyses with their alternative proposals, as well as with their comments on our proposals.

ADMINISTRATIVE MATTERS

14. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared another initial regulatory flexibility analysis (IRFA) of the expected impact of the proposed rule changes on small entities. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. The comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

15. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation must provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

17. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's written comments, memoranda, or filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

18. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 2, 1990, and reply comments on or before March 13, 1990. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

ORDERING CLAUSES

19. Accordingly, pursuant to Sections 1, 4(i) - (j) and 223(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) - (j) and 223(b)(3), and 5 U.S.C. § 553, there is issued a NOTICE OF PROPOSED RULE MAKING to amend Part 64 of the Rules, 47 C.F.R. Part 64 as indicated herein.

20. The Secretary shall cause a copy of the Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1980)).

21. The Notice of Proposed Rule Making contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collections requirement on the public. Implementation of any new requirement will be subject to approval by Office of Management and Budget as prescribed by the Act.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Section 521. RESTORATION AND CORRECTION OF DIAL-A-PORN SANCTIONS.

(1) Amendment. - Section 223 of the Communication Act of 1934 (47 U.S.C. § 223) is amended by striking subsection (b) and inserting the following:

(b)(1) Whoever knowingly -

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly -

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5) (A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either-

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of -

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection.

(B) any access permitted -

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

(2) Conforming Amendments. - Section 2(b) of the Communications Act of 1934 is amended by striking "section 224" and inserting "section 223 or 224".

(3) Effective Date. - The amendments made by this subsection shall take effect 120 days after the date of enactment of this Act.

APPENDIX B

Part 64, Chapter I of Title 47 of the Code of Federal Regulations, is proposed to be amended as follows:

1. Section 64.201 is proposed to be revised to read as follows:

64.201 Restrictions on Obscene or Indecent Telephone Message Services.

It is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b), that the defendant has notified the common carrier identified in Section 223(c)(1) of the Act, in writing, that it is providing the kind of service described in Section 223(b) of the Act, has complied with subsection (d) below where applicable, and, in addition,

(a) Requires payment by credit card before transmission of the message; or

(b) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(c) Scrambles the message using frequency inversion techniques so that it is unintelligible and incomprehensible to the calling party without use of a descrambler by the calling party.

(d) Where the defendant is a message sponsor subscribing to mass announcement service tariffed at this Commission and such defendant, prior to the transmission of the message, has requested in writing to the carrier providing the announcement service that calls to this message service be subject to billing notification as an adult telephone message service.

APPENDIX C

Initial Regulatory Flexibility Act Analysis

1. *Reasons for Action:* Section 223(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b)(3), authorizes the Commission to adopt rules and regulations limiting access to obscene or indecent telephone message service by persons 18 years of age or older.

2. *Objectives:* The Commission proposes to adopt rules that will curtail children's access to these services while retaining reasonable access for adults. The Commission has adopted regulations in response to earlier legislation but the revised statute and United States Supreme Court decision in *Sable*, cited in the Notice, require additional public comment.

3. *Legal basis:* Action proposed here is taken pursuant to Sections 4(i) and 223(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 223(b)(3).

4. *Description of potential impact and number of small entities affected:* This action will have primary effect on sponsors of dial-a-porn types of services. It is unclear how many such sponsors there are when all kinds of message services (rather than dial-it) are involved. We believe our proposals are the least burdensome available to these operators, consistent with Congressional direction. (Telephone companies are not considered small businesses for purposes of this analysis. *See Market Structure (Phase I)*, 93 FCC 2d 241, 338 (1983).) We therefore ask small entities to comment on the impact they foresee arising out of adoption of any of the rules we or others are proposing.

5. *Recording, recordkeeping and other compliance requirements:* None mandatory.

6. *Federal rules which overlap, duplicate or conflict with this rule:* None.

7. *Any significant alternatives minimizing impact on small entities and consistent with stated objective:* None.

FOOTNOTES

[1] *See* Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989). The legislation was enacted on November 21, 1989 and becomes effective 120 days later.

[2] Appendix A contains the text of the revised Section 223.

[3] Pub. L. 98-214, 97 Stat. 1469, Dec. 8, 1983.

[4] The Commission required that access codes be assigned by the message provider through a written application procedure under which the age of the applicant could be reasonably ascertained.

[5] *See* Public Notice No. 4315, May 6, 1986.

[6] Section 223(b) was again revised by Congress in the Child Protection and Obscenity Enforcement Act of 1988, § 7524, 102 Stat. 4502, enacted as Title VII, Subtitle N, of the Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 4181, Nov. 18, 1988. This revision placed the prohibition against obscene commercial telephone messages in a subsection separate from that containing the prohibition against indecent messages. The prohibition against obscene or indecent telephone messages was enforceable only through criminal penalties and no longer through administrative proceedings by the Commission.

[7] *See* para. 8, *supra*, and 109 S.Ct. at 2838-39.

[8] In *Carlin III*, *supra*, the court directed the Commission to "reopen its proceedings to consider the feasibility, costs and benefits" of other alternatives as they became available. 837 F.2d at 556.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Theodore D. Little File No. 7271-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group Channels at
Minneapolis, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1990; Released: February 23, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Theodore D. Little (Little) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Minneapolis, Minnesota area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Little filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Little, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for Minneapolis, although Kevin Rullman subsequently withdrew his application. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Little failed to disclose the identity of the real-parties-in-interest to his application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. Microband also contends that Little has not adequately demonstrated his financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In his opposition, Little notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Little relies upon his sworn affidavit to support his assertion that he has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that he failed to adequately demonstrate his financial qualifications to construct and operate the above-referenced MMDS station, Little submits an updated financial statement.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988) (hereinafter cited as *Astroline)*. In the instant case, Microband alleges the apparent existence of real-party-in-interest rule, one-to-the-market rule, and financial qualification violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Little failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were filed and prepared by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the coincidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In his Opposition, Little states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Little's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. With regard to Microband's allegation that Little failed to adequately demonstrate his financial qualifications pursuant to Section 21.17, we note that since Microband's petition to deny was filed, the Commission revised rule Section 21.17 in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), to allow new applicants to submit a financial certification of their ability to meet estimated construction costs and the expenses of operating for a period of one year.[8] In that Rule Making order, the Commission stated:

> . . . In the NPRM we proposed to delete Section 21.17 because we believed that the requirement added to our regulatory burden and was a potential cause of unwarranted delay (for example when financial qualifications were unjustly challenged) without corresponding benefits to the public. . . . We conclude, therefore, that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applications without burdening the applicants and the Commission staff with additional detailed information.

Id. at 5718-19.

> As discussed in paragraph 37, pending applications that will be granted after the new rules become effective will be treated as though they had been filed under the new rules. For those applications already containing financial data demonstrating financial ability to construct and operate the proposed facility, we will treat that information as if it were a certification of financial ability under the new rules. Only those applicants whose applications are deficient with regard to this information, and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules.

Id. at n. 57. Little's application is subject to this policy. Little will be required to file a financial certification within thirty (30) days of the release date of this order. Failure to submit the financial certification within thirty days may result in the dismissal of Little's application.

9. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petition to deny filed by Microband will be denied.

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. IT IS FURTHER ORDERED that Theodore D. Little must submit a financial certification pursuant to 47 C.F.R. § 21.17 within thirty (30) days of the release date of this order.

11. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Minneapolis. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such

areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

[8] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant must demonstrate that it is financially qualified. However, the new Section 21.17 changes only the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Theodore D. Little File No. 7263-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group Channels at
Huntsville, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1990; Released: February 23, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Theodore D. Little (Little) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Huntsville, Alabama area was selected for qualification review as the result of a Commission lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny,[1] challenging the application. Little filed an Opposition to the Petition to Deny.

2. *Pleadings*. In its Petition, Microband alleges that Little, together with eleven other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for Huntsville. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Little failed to disclose the identity of the real-parties-in-interest to his application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule.

3. In his opposition, Little notes that Microband's Petition to Deny does "not contain a single affidavit in support of [Microband's] petition nor is there any proof or substantive evidence to substantiate [Microband's] allegations." Opposition at 2. Little relies upon his sworn affidavit to support his assertion that he has not violated the real-party-in-interest and one-to-a-market rules.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988) (hereinafter cited as *Astroline)*. In the instant case, Microband alleges the apparent existence of real-party-in-interest rule and one-to-the-market rule violations. After consideration of Microband's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Little failed to disclose the real-parties-in-interest and filed multiple applications would alter the Commision's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[3] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). Microband's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[4] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[5] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[6] Microband's allegations of rule violations are based upon evidence that "cookie-cutter" applications were filed and prepared by a single group. However, it has been recognized that applications that are totally unrelated may be similar as a result of the co-

incidental use of common engineering and legal consultants.[7] *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990). In his Opposition, Little states in rebuttal:

> There were no agreements or understandings existent or under negotiation at the time of the filing of these applications which affected the ownership or control of the proposed facilities, or any right or interest therein by any person not a party to my application. In addition, there are no agreements or understandings regarding ownership or control at this time.

Opposition at 2. We find Microband's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Little's rebuttal. *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987); *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987).

8. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that Microband's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petition to deny filed by Microband will be denied.

9. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by Microband Corporation of America IS HEREBY DENIED. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Warren Ache, Jody Barnes, Edna Cornaggia, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Kevin Rullman, Sherry Rullman, Steven Rullman, and David Wiechman.

[3] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[4] Microband argues that an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Huntsville. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[5] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[6] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[7] We note that Microband failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, Microband did not provide the amount of specific facts to substantiate its allegations as provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not suffficient." *Beaumont*, 854 F.2d at 507.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Stephen Communications, Inc. — File No. 13543-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group Channels at Dayton, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1990; Released: February 23, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephen Communications (Stephen) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Dayton, Ohio area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) and Continental Cablevision of Ohio, Inc. (Continental) filed post-lottery Petitions to Deny,[1] challenging the application. Stephen filed a Reply to the Petition to Deny of the Committee.

2. *Pleadings*. In their Petitions, the Committee and Continental allege that Stephen, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Dayton. The petitioners contend that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill,[5] and the similarities in technical and other information among the applications, and the Letter of Understanding between Stephen and Bruce Merrill[6] should lead the Commission to conclude that Stephen failed to disclose the identity of the real-party-in interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). In addition, petitioners allege these same facts demonstrate that Stephen filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Stephen failed to disclose its affiliation or relationship to its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900.

3. In its Reply, Stephen argues that it has not violated the real-party-in-interest and one-to-a-market rules because no one other than Stephen Merrill owns or controls any interest in Stephen. Reply at 6.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, the petitioners allege the apparent existence of real-party-in-interest rule, one-to-the-market rule, and non-affiliation rule violations. After consideration of the petitioners' allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Stephen failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality[7] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The petitioners' allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[8] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[9] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin*

Television Improvement Corp., 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[10] The petitioners' allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed. However,"[t]here is no indication in the record that [Bruce] Merrill has any financial interest or reponsibility for any of the applicatons." *VCI*, 2 FCC Rcd at 1898. Stephen asserts that "no one other than Stephen Merrill has ever had an ownership interest in [Stephen]. Furthermore, no one but Stephen Merill is or will be in a position to actually or potentially control the operation of [Stephen's] proposed MMDS facilities." Reply at 14. We find the petitioners' unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Stephen's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Stephen violated the non-affiliation provision of Section 21.900 because it failed to submit a statement disclosing the affilation or relationship between Stephen and Bruce Merrill as an intended or likely subscriber. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). Stephen argues that there was no need to submit an affiliation statement pursuant to Section 21.900 because his relationship with Bruce Merrill is not financial or business related, but is familial. We note that at the time Stephen initially filed its application, the application included a copy of the Letter of Understanding between Stephen and Bruce Merrill. Therefore, there is no issue here of non-disclosure of the fact that Bruce Merrill would be the intended or likely subscriber for Stephen's MMDS station in Dayton. Therefore, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900.

9. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Stephen "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. Stephen is reminded that the Commission imposed in that order a condition on any MMDS authorization Stephen obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Stephen] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affilated as a customer-programmer." *Id.*

10. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee and Continental, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petitions to deny filed by the petitioners are denied.

11. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries and Continental Cablevision of Ohio, Inc. ARE HEREBY DENIED. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as VCI).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Stephen's MMDS application submission, citing Bruce Merrill's statement that "[s]ince a lottery system was proposed . . . it would be better for various members of the family to file their applications independent of each other." Committee Petition at 17.

[4] Bruce Merrill is the father of Stephen Merrill, the president and 100% stockholder of Stephen Communications, Inc.

[5] The Committee claims that Stephen may have lacked sufficient funds to pay for the preparation and filing of its MMDS applications. Committee Petition at 17.

[6] This Letter of Understanding states that Bruce Merrill, through his company, MerrillCom, will provide programming services to Stephen, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[7] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[8] The petitioners argue that Bruce Merrill, through his company, MerrillCom, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Dayton. If true, there would exist violations of both of these rules. *David Lausttsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[9] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[10] Section 21.901(d)(2) provides:

The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southernnet of South Carolina, Inc.	I-T-C-90-015
Teleconnect Long Distance Service and Systems Company	I-T-C-90-016
Cable & Wireless Communications, Inc.	I-T-C-90-017

Applications for authority to acquire and operate terrestrial facilities to provide switched communications services between the United States and Canada.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 15, 1990; Released: February 23, 1990

By the Chief, International Facilities Division:

1. On November 8, 1989, the Commission placed on Public Notice the above-captioned applications for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to acquire and operate terrestrial facilities to provide switched communications services between the United States and Canada. The applications are unopposed.

2. The three applicants are common carriers currently authorized to provide international switched voice services to a number of countries, including Canada, on a resale basis. Southernnet of South Carolina, Inc. (Southernnet) and Teleconnect Long Distance Service and Systems Company (Teleconnect) are classified as non-dominant in their provision of international common carrier services pursuant to the Commission's decisions in *International Competitive Carrier*, 102 F.C.C. 2d 812 (1985) *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986). Thus, Southernnet and Teleconnect are subject to streamlined regulation in their provision of international common carrier services. Cable and Wireless Communications, Inc. (C&W) is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As a result, C&W is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies and is dominant in its provision of international common carrier services between U.S. and international points. Thus, C&W remains subject to traditional entry and rate regulation.

3. The instant applications seek authority to supplement the applicants' current authorizations to provide resale services with authority to operate as facilities-based carriers to Canada. The applicants will acquire facilities through the International Carrier Group (ICG) according to the terms of the ICG joint venture agreement. C&W and Telecom USA Inc, the parent company of Southernnet and Teleconnect, are two of the four members of ICG.[1] Each applicant will carry international switched traffic bound for Canada over its domestic communications network to one of four centralized switching points, provided under contract to ICG by Metromedia. At these points, the ICG members' traffic will be concentrated and carried by Metromedia to transborder private line facilities provided under contract to ICG by MCI Telecommunications Corporation (MCI).

4. The applicants advise that their applications result from ICG's successful negotiation, on behalf of its members, of an operating agreement with Telecom Canada for the provision of switched voice service between the U.S. and Canada. C&W states that the ICG partnership allows smaller carriers lacking sufficient international traffic levels to operate independent facilities-based services the opportunity to provide facilities-based switched service to Canada for the first time.

5. Our review of the record demonstrates that grant of the instant applications will serve the public interest by increasing competition in the provision of facilities-based international switched communications services with Canada.[2] In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial. [3]

6. Separate from the public interest benefits to be derived from increased facilities-based competition through the applicants' provision of switched communications services with Canada is the question of the appropriate regulatory treatment of ICG's operations. We have reviewed the nature and makeup of ICG and, on the record before us, conclude that ICG's operations do not appear to constitute common carriage under either prong of *NARUC I*, 525 F. 2d 630, 641 (D.C. Cir. 1976). Thus, we will not require ICG to file a Section 214 application to provide facilities to its member carriers for the provision of switched communications services to Canada. However, we will retain jurisdiction to review ICG's operations with respect to the Canadian market and other markets that ICG member carriers may now serve or later seek to serve on a facilities basis. Should new information concerning ICG's operations come to our attention, we will consider changing our regulatory treatment of ICG as appropriate.

7. Moreover, we note that although the ICG members seek authority to offer both IMTS and non-IMTS switched communications services with Canada, their current operating agreement with Telecom Canada covers only IMTS. The Commission long has recognized that the prior grant of Section 214 authority can serve as an important negotiating tool for carriers seeking operating agreements. *See, e.g., International Relay, Inc.*, 77 F.C.C. 2d 819, 827 n. 22 (1980). However, we remind the ICG participants that any operating agreements negotiated for non-IMTS services or any modifications to the current IMTS operating agreement also are subject to the requirements of the Commission's international settlements policy, *International Settlements Policy*, 51 Fed. Reg. 4736 (Feb. 7, 1986), *on reconsideration*, 2 FCC Rcd 1118 (1987).

8. In view of the foregoing, we find that the public convenience and necessity will be served by approving the instant applications.

9. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-015, I-T-C-90-016, and I-T-C-90-017 ARE GRANTED and C&W, Southernnet and Teleconnect each is authorized to:

(a) lease and operate switching and transmission facilities provided to ICG by Metromedia at Seattle, Washington, Albany and New York City, N.Y. (via Rouses Point), Detroit, Michigan and Buffalo, N.Y.;

(b) lease and operate the following channels provided to ICG by MCI between ICG operating offices set forth in para. 9(a) and the U.S./Canada border:

U.S./Canadian Border	No. of Circuits/Carrier
Seattle, Washington, to New Westminster, B.C.	up to 5 T-1 circuits
Albany (via Rouses Point) N.Y. and/or New York City (via Rouses Point), N.Y. to Le Domain, Quebec	up to 5 T-1 circuits
Detroit, Michigan to Windsor, Ontario and/or Buffalo, N.Y. to Ft. Erie, Ontario; and	up to 13 T-1 circuits[4]

(c) use these facilities for the provision of switched communications services between the U.S. and Canada.

10. IT IS FURTHER ORDERED that grant of File No. I-T-C-90-017 is subject to the condition that C&W will be classified as dominant in the provision of international switched communications services with Canada absent an express determination by the Commission that C&W is non-dominant.

11. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter.

12. IT IS FURTHER ORDERED that Southernnet, Teleconnect and C&W shall file copies of any operating agreement for Canada and any inter-carrier contract entered into by each or any applicant or ICG within 30 days of its execution.

13. IT IS FURTHER ORDERED that any operating agreement entered into by or on behalf of Southernnet, Teleconnect and/or C&W with respect to the services authorized in this Order is subject to the requirements of the Commission's international settlements policy, *see supra* para. 7.

14. IT IS FURTHER ORDERED that each applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

15. IT IS FURTHER ORDERED that C&W shall file annual traffic and revenue reports as provided for in CC Docket 86-494 concerning traffic originating or terminating within the United States.

16. IT IS FURTHER ORDERED that Southernnet and Teleconnect each shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

17. IT IS FURTHER ORDERED that C&W shall file additional Section 214 applications to supplement existing facilities to Canada.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective on release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The other members are Allnet Communications Services, Inc. and ITT Communications Services, Inc. (on its own behalf and on behalf of Metromedia Long Distance).

[2] For purposes of this authorization, we consider switched communications services to include both traditional IMTS and switched non-IMTS services. *See* International *Competitive Carrier*, 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986).

[3] *See, e.g.*, the cases cited in Teltec Savings Communications Co., File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n. 2.

[4] These may be up to 13 circuits from Detroit or Buffalo or a combination.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 16, 1990

FCC ANNOUNCES THIRD MEETING OF THE ONA JOINT CONFERENCE (CC Docket 88-2, Phase I)

The Federal/State Joint Conference on Open Network Architecture (ONA) will convene its third meeting at 1:00 p.m., on Thursday, March 1, 1990, at the J.W. Marriott Hotel at National Place, 1331 Pennsylvania Avenue, N.W., Washington, DC. The meeting will be open to the public, although participation is limited to Conference members and FCC Commissioners.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The creation of a Joint Conference was initially announced in the Federal Communications Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)). Three FCC Commissioners and thirteen state commissioners serve as Conference members.

For further information contact Steven Gorosh, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-45

In the Matter of

Amendment of Section 73.202(b), RM-7121
Table of Allotments,
FM Broadcast Stations.
(Clovis and Madera, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 29, 1990; Released: February 23, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Madera Broadcasting, Inc. (petitioner), licensee of Station KXMX(FM), Channel 221B1, Madera, California, seeking amendment of the FM Table of Allotments to change the community of license for Channel 221B1 from Madera to Clovis, California, and modification of its license accordingly. Petitioner provided information in support of its proposal.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to Clovis at the petitioner's specified site, located 12.9 kilometers (18 miles) north[2] of the community, is mutually exclusive with the present allotment of Channel 221B1 at Madera. The distance between the two reference points is 35.1 kilometers whereas 175 kilometers is required by Section 73.207(b) of the Commission's Rules between co-channel Class B1 allotments. Petitioner adds that Madera (pop. 21,732) [3] has two FM allotments[4] and one full-time AM station[5] whereas Clovis (pop. 33,021) has no local FM service and one daytime only AM station.[6] Thus, petitioner urges that its proposal would equalize the number of FM channel allotments between Madera and Clovis, would not deprive Madera of local service,[7] and would result in a preferential arrangement of allotments under the Commission's allotment scheme by providing Clovis with its first local FM service.

3. In further support of its proposal, petitioner alleges that since it began operating on Channel 221B1 at Madera earlier this year, Station KXMX(FM) has received interference at various points in its primary service area. Petitioner adds that it has been unable to determine the source of the interference and consequently its efforts to eliminate the cause have been unsuccessful. Petitioner speculates that the relocation of the Station KXMX transmitter to the site specified in its proposal will likely provide for a greater interference free reception area, thus enabling it to deliver an improved signal over its coverage area at Clovis.

4. A staff engineering analysis reveals that Channel 221B1 can be allotted to Clovis in conformity with the Commission's rules and regulations.[8]

5. In view of the above, we believe the public interest would be served by soliciting comments on the proposed reallotment of Channel 221B1 from Madera to Clovis, California, as that community's first local FM service. As requested, we also propose to modify the license of Station KXMX(FM), to specify Clovis as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 221B1 at Clovis. *See Report and Order, supra.*

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Clovis, California	–	221B1
Madera, California	221B1, 297A	297A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **April 16, 1990,** and reply comments on or before **May 1, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis P. Corbett, Esq.
Stephen D. Baruch, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order*, MM Docket No. 88-526, *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989); *recon. pend.*

[2] Coordinates at the petitioner's specified site are 36-55-50 and 119-38-38.

[3] Population figures were taken from the 1980 U.S. Census.

[4] Petitioner advises that in addition to its Station KXMX(FM), a construction permit was recently awarded on FM Channel 297A at Madera to Madera FM, Inc. (BPH-870827NM).

[5] Petitioner advises that it is also the licensee of Station KHOT(AM), Madera.

[6] Station KOOO(AM) is presently licensed to Clovis.

[7] In this regard, petitioner asserts that in addition to service to be provided on Channel 297A at Madera, it will continue to provide local service to the community over its AM Station KHOT. Moreover, petitioner avers that if its proposal is adopted, it will also continue to provide FM service to Madera from its intended transmitter site, although it is not required to do so, citing 4 FCC Rcd at 4873.

[8] Coordinates used in this determination are those at the intended site specified by petitioner for Channel 221B1 at Clovis, as indicated, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-403

In the Matter of

Amendment of Section 73.202(b),	RM-5776
Table of Allotments	RM-6189
FM Broadcast Stations	RM-6190
(Douglas, Broxton, Hinesville, and Hazelhurst, Georgia)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 26, 1990; Released: February 23, 1990

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it the *Order to Show Cause* in this proceeding directed against Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, Channel 228A, Hazelhurst, Georgia, 4 FCC Rcd 7779 (1989). Jeff Davis Broadcasters, Inc. filed comments. For the reasons discussed below, we are not modifying the license of Station WVOH-FM to specify operation on Channel 229A. We are allotting Channel 223A to Douglas, Georgia, as a first local service, and modifying the license of Station WXLQ (formerly WBLU), Channel 221A, Hinesville, Georgia, to specify operation on Channel 222C2.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Gerald Lee Carter proposing the allotment of Channel 222A to Douglas, Georgia, as a third local FM service. In response to the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 6002 (1987), Hinesville Broadcasting Corporation, licensee of Station WXLQ, Channel 221A, Hinesville Georgia, filed a counterproposal proposing the substitution of Channel 222C2 for Channel 221A at Hinesville, and the modification of the Station WXLQ license to specify operation on Channel 222C2. In addition, Frank A. Roundtree submitted a counterproposal proposing the allotment of Channel 222A to Broxton, Georgia, as a first local service. A Channel 222A allotment at Broxton conflicted with the proposed Channel 222A allotment at Douglas, but did not conflict with the proposed Channel 222C2 upgrade at Hinesville.

3. In a *First Report and order* in this proceeding, 4 FCC Rcd 7781 (1989), we allotted Channel 279A to Broxton, Georgia. In regard to the remaining conflict between a Channel 222A allotment at Douglas, and a Channel 222C2 upgrade at Hinesville, we undertook channel searches for alternate channels for both communities. As a result of those channel searches, we determined that Channel 227A could be allotted to Douglas if Station WVOH-FM in Hazelhurst were to change its channel from Channel 228A to Channel 229A. This would enable us to make an allotment to Douglas and upgrade the existing allotment at Hinesville. Therefore, we issued the *Order to Show Cause* directed to Jeff Davis Broadcasters, Inc.

4. On September 18, 1989, we released a *Report and Order* in MM Docket No. 88-460, 4 FCC Rcd 6876 (1989), substituting Channel 265A for Channel 223A at Lyons, Georgia. As a result of that channel substitution, we are now able to allot Channel 223A to Douglas without the need to modify the license of Station WVOH-FM, Hazelhurst, Georgia. We believe that it would be in the public interest to allot Channel 223A to Douglas, Georgia, as a new service and upgrade the existing allotment at Hinesville, Georgia.[1]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the Table of FM allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below to read as follows:

City	Channel No.
Douglas, Georgia	223A, 258C and 294C1
Hinesville, Georgia	222C2 and 284A

6. The window period for filing applications for the Channel 223A allotment at Douglas, Georgia, will open on **April 10, 1990,** and close on **May 10, 1990.**

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hinesville Broadcasting Corporation for Station WXLQ, Hinesville, Georgia, IS MODIFIED effective 1990, to specify operation on Channel 222C2 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink, Acting Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates for Channel 223A at Douglas, Georgia, are 31-34-12 and 82-54-54, and the reference coordinates for Channel 222C2 at Hinesville, Georgia, are 31-52-25 and 81-33-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Melbourne, Florida)

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1990; Released: February 23, 1990

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by WWRM, Inc., directed to the staff action of December 15, 1988, returning its petition for rule making proposing the deletion of Channel 296C1 at Melbourne, Florida. Silicon East Communications Partnership ("Silicon") filed an Opposition to the Petition for Reconsideration, and WWRM, Inc., filed a Reply to the Opposition. Finally, Silicon filed a "Motion for Leave to File Responsive Pleading" and a "Response of Silicon East Communications Partnership to Reply to Opposition."[1] For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. On February 10, 1988, we released a *Report and Order* in MM Docket No. 87-233, substituting Channel 296C1 for Channel 296A at Melbourne, Florida, and modifying the license of Station WVTI, Channel 296A, Melbourne, Florida, to specify operation on Channel 296C1. Channel 296C1 was allotted to Melbourne with a 11.6-kilometer (7.2 miles) northwest site restriction. 3 FCC Rcd 611 (1988). Thereafter, Silicon, licensee of Station WVTI, filed the appropriate application to implement the channel upgrade (File No. BPH-880628IA). In that application, Silicon requested waiver of Section 73.207(b) of the Rules in order to permit a 36.1-kilometer short-spacing to Station WOOJ-FM, Channel 296C2, Lehigh Acres, Florida. In its waiver request, Silicon requested that it be permitted to use a directional antenna at the specified site consistent with the action then being considered in MM Docket No. 87-121 proposing the use of FM directional antennas.[2] In regard to a site complying with the applicable minimum spacing requirements, Silicon stated that there was no available property which was "properly zoned" for such usages. Silicon also stated that FAA approval could not be obtained for the erection of a tower of sufficient height to obtain a HAAT of 299 meters. On October 24, 1988, the Chief of the FM Branch denied the waiver request and dismissed the application. In that action, it was determined that reliance on a proposed change in the Rules to permit a directional antenna at the proposed site was premature, and the facts and circumstances advanced by Silicon were insufficient to justify waiver of the minimum spacing requirements.

3. Against this background, WWRM, Inc. ("WWRM"), licensee of Station WWRM, Channel 297C1, St. Petersburg, Florida, filed a petition for rule making on October 20, 1988, requesting that Channel 296C1 be deleted from Melbourne.[3] In that petition for rule making, WWRM contends that Silicon failed to demonstrate in MM Docket No. 87-233 the availability of a site complying with the minimum spacing requirements. WWRM argues that, for this reason, the allotment was defective and should be deleted. In support of this contention, WWRM refers to the subsequent application (File No. BPH-880628IA) by Silicon requesting waiver of the minimum spacing requirements stating that there was no "properly zoned" property for the erection of the tower and that the FAA would not approve a tower with HAAT of 299 meters. Returning the petition for rule making, the staff first acknowledged the dismissal of the earlier Silicon application upon which WWRM had based its petition for rule making. The staff noted, however, that a subsequent application (File No. BPH-881117IC) by Silicon would comply with the minimum spacing requirements upon grant of a pending application by Station WOOJ, Lehigh Acres, Florida. Consequently, the staff determined that the underlying basis for the WWRM petition for rule making was no longer valid, and returned the petition for rule making.

4. In support of its Petition for Reconsideration, WWRM again argues that the Channel 296C1 allotment in MM Docket No. 87-233 was premised on an erroneous finding with respect to a suitable transmitter site complying with the minimum spacing requirements. Therefore, WWRM concludes that the allotment was defective and should now be deleted. Referring to the subsequent application complying with the minimum spacing requirements, WWRM contends that an erroneous determination in the *Report and Order* in MM Docket No. 87-233 cannot be rectified by a subsequent application. The Petition for Reconsideration also cites the Silicon waiver request in application BPH-880628IA stating that there was no "properly zoned" property for the erection of a tower and that the FAA would not approve a tower sufficient for a HAAT of 299 meters. WWRM concludes that in addition to undermining the representation in MM Docket No. 87-233 with respect to a suitable transmitter site, the inconsistent representations to the Commission constitute a misrepresentation.

5. In its Opposition, Silicon contends that it had a reasonable expectation of a suitable transmitter site in MM Docket No. 87-233. In this regard, Silicon refers to a specific parcel of land owned by the H. Ellis Saxton Trust, and approved by the FAA for a tower height of 321 feet.[4] Silicon also states that this land parcel has been zoned "Commercial Parkway" which would permit erection of a tower. This property was available at the time of the *Report and Order* in MM Docket No. 87-233, and would have permitted Station WVTI to operate as a Class C1 station in compliance with the minimum spacing requirements set forth in Section 73.207(b) of the Rules. Silicon also refers to the subsequent statement by its consulting engineer in support of a waiver of Section of 73.207(b) pertaining to a lack of "proper zoning" for a transmitter site. In this connection, Silicon asserts that its consulting engineer had meant "preferred" zoning from the standpoint of land cost.

DISCUSSION

6. We deny the Petition for Reconsideration. There is no basis to delete Channel 296C1 at Melbourne, Florida, which would require us to set aside our action in MM Docket No. 87-233. There was at the time of the *Report and Order* in MM Docket No. 87-233 a reasonable assurance that a suitable site was available that would comply with the minimum spacing requirements. In view of the compliance with this requirement, there is no basis to delete Channel 296C1 at Melbourne. *Cf. Pinckneyville, Illinois*, 41 RR 2d 69 (1977). There is no requirement that a proponent for a channel allotment in a rule making proceeding actually propose the referenced site in a subsequent application. In the present case, we are satisfied that Silicon proposed a different site in its application in order to reduce land cost, avoid the expense of erecting a tower, and achieve a greater antenna height. The fact that the FM Branch denied Silicon's waiver request does not undermine the Channel 296C1 allotment in this instance.

7. As correctly noted by WWRM, the Silicon waiver request in the subsequent application was based on a premature use of a directional FM antenna, and the fact that no "properly zoned" transmitter site was available. WWRM contends that the use of the phrase "properly zoned" in connection with a transmitter site was inconsistent with Silicon's representation in the rule making proceeding and thus constitutes a misrepresentation. This issue is not appropriately considered in this proceeding for two reasons. First, there was no misrepresentation in the rule making proceeding allotting Channel 296C1 to Melbourne. As indicated by Silicon in paragraph 5, *supra*, there was, in fact, a suitable transmitter site at the time of the *Report and Order* in MM Docket No. 87-233. The fact that Silicon may, at the time of the *Report and Order*, have intended to consider other transmitter sites based on financial considerations does not render any representation in MM Docket No. 87-233 concerning a suitable transmitter site a misrepresentation. Second, the alleged misrepresentation regarding a "properly zoned" transmitter site occurred in the subsequent application. There is no reason to revisit the rule making proceeding to consider such an issue. Moreover, we do not intend to prejudge this issue in this proceeding in the event that WWRM pursues its claim in connection with a non-allotment proceeding in which the qualifications of the licensee may appropriately be considered. *Cf. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir.1989).

8. Accordingly, the aforementioned Petition for Reconsideration filed by WWRM, Inc., IS HEREBY DENIED.

9. IT IS FURTHER ORDERED, That the "Motion for Leave to File Responsive Pleading" filed by Silicon East Communications Partnership IS DENIED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Acting Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Silicon requests leave to respond to additional statements made by WWRM, Inc., in its Reply to Opposition. Those statements pertain to a misrepresentation to the Commission that Silicon allegedly made in an application (File No. BPH-880628IA) concerning the availability of a fully spaced site. Inasmuch as we are not considering the issue of misrepresentation in connection with the subsequent application in this proceeding, such a response is unnecessary. Therefore, the "Motion for Leave to File Responsive Pleading" will be denied, and the "Response of Silicon East Communications Partnership to Reply to Opposition" will not be considered.

[2] Subsequently, the Commission adopted a *Report and Order* permitting the use of FM directional antennas in connection with FM applications. 4 FCC Rcd 1681 (1988).

[3] Deletion of Channel 296C1 from Melbourne would permit grant of an application by Station WWRM to relocate its transmitter site (File No. BPH-881020ID).

[4] In its Opposition, Silicon also expressed its belief that the FAA would approve an increase in tower height. However, any increase in tower height would not be necessary in this instance since Section 73.211 of the Rules does set a minimum antenna height for a Class C1 station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-540

In the Matter of

Amendment of Section 73.202(b), RM-6546
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 2, 1990; Released: February 23, 1990

By the Chief, Allocations Branch:

1. At the request of Tom-Tom Communications, Inc. ("petitioner" or "Tom-Tom"), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7024 (1988), proposing the substitution of Channel 281C1 for Channel 282C at Rapid City, South Dakota, and the modification of its construction permit to specify the substitute channel. The petitioner filed comments in which it reiterates its intention to apply for Channel 281C1, if allotted. Spitzer Communications Co. ("Spitzer") filed comments. Petitioner filed reply comments.[1]

BACKGROUND

2. Channel 282C was allotted to Rapid City pursuant to the request of William H. Payne. The channel was allotted without the imposition of a site restriction. No party raised an issue as to possible problems with receiving Federal Aviation Administration approval. *See Report and Order* in MM Docket 84-504, 50 Fed. Reg. 24643, published June 12, 1985. Petitioner and Spitzer, along with three other parties, subsequently filed applications for use of Channel 282C at Rapid City. Spitzer's application was returned as untenderable on August 19, 1985, but was reinstated on January 27, 1986, pursuant to a petition for reconsideration. Upon further review, Spitzer's application was again returned, by letter of March 21, 1986, because it proposed facilities below the minimum for Class C stations as set forth in Section 73.211 of the Commission's Rules. On April 21, 1986, Spitzer petitioned for reconsideration. Spitzer contended that the Commission failed to consider the requested waiver of Section 73.211 which had accompanied its original application. In denying the petition for reconsideration, the Commission stated that Spitzer's waiver request had been considered, even though it had not been specifically addressed in the letter. Spitzer's waiver request stated that radio service to Rapid City is subject to significant shadowing problems because the community is located in a valley surrounded by hills. Spitzer went on to state that it had conducted a lengthy search through several local real estate companies, over a ten year period, for a suitable antenna site at which shadowing would not be a problem.[2] Spitzer claimed that the search resulted in a determination that the Skyline Drive area was the only location from which the city could be covered without shadowing. Spitzer further contended that the FAA has placed height restrictions on towers in the area. While recognizing that there were several sites south of Rapid City where a tower meeting minimum Class C height requirements could be constructed and meet FAA approval, Spitzer contended that such sites would result in severe shadowing problems. Therefore, Spitzer proposed use of a site which it believed would not cause shadowing problems, but could not be used with Class C facilities and still receive FAA approval.

3. In denying Spitzer's waiver request, the Commission found that the request was "composed completely of unsupported assertions and conclusions. No documentation whatsoever was supplied to verify Spitzer's claims as to FAA restrictions, or shadowing experienced from other sites." Therefore, based on the lack of substantiated claims, the Commission found that a waiver of Section 73.211 would not be in the public interest. The Commission also noted that two other applicants for the Rapid City allotment had already received FAA approval for proposals meeting the necessary height restriction. *See Hearing Designation Order* ("HDO"), 2 FCC Rcd 5912 (1987). On January 26, 1988, an Administrative Law Judge issued a *Summary Decision* granting Tom-Tom's application. The *Summary Decision* stated that Tom-Tom was the only remaining applicant for Channel 282C at Rapid City. The air hazard issue was resolved in Tom-Tom's favor based on a Determination of No Hazard to Air Navigation issued by the FAA's Des Plains, Illinois, office on January 13, 1988. *See Summary Decision*, 3 FCC Rcd 546, released February 3, 1988. On September 22, 1988, Tom-Tom filed the instant petition for rule making, noting that it wished to avoid the substantial additional expense and risk necessary to satisfy conditions placed on the grant of the FAA's no-hazard determination.

THE PLEADINGS

4. Spitzer opposes grant of petitioner's request. It contends that petitioner's proposal, if granted, would perpetuate a fraud upon the Commission and permit Tom-Tom to benefit from misrepresentation or lack of candor, deny Spitzer its right to a full and fair hearing under Section 309 of the Communications Act and *Ashbacker Radio v. FCC*, 326 U.S. 327 (1945), and deny the public the benefits which result from open competition for new broadcast allotments. Spitzer states that the petitioner now seeks to operate the Rapid City station in essentially the same manner as Spitzer had proposed in its dismissed application. Spitzer states that Tom-Tom's original application for a construction permit (BPH-850712SW) specified Class C facilities at a site on Skyline Drive, but that the application was amended to specify a new site ("Johnson site") when the FAA failed to approve full Class C facilities at the Skyline Drive site. It contends that the Commission designated an air hazard issue against Tom-Tom because there was a "substantial question" as to the suitability of the Johnson site. According to Spitzer, the FAA found that the Johnson site would constitute an air hazard on April 6, 1987, but on January 13, 1988, issued a No Air Hazard Determination subject to the condition that Tom-Tom take such action as necessary to eliminate any

electromagnetic interference caused to aeronautical frequencies." Spitzer characterizes this condition as being "undisclosed." Based on its interpretation, Spitzer argues that the construction permit was granted even though Tom-Tom does not now believe, and has never believed, that such a condition could be satisfied, thus giving rise to the charge of misrepresentation and lack of candor.

5. Spitzer argues that to grant petitioner's request to substitute Channel 281C1 for Channel 282C at Rapid City and modify its construction permit accordingly would transfer an exclusive right from a channel which petitioner concealed as being unusable to one which is usable, without permitting competition for the usable frequency. It argues that the Commmission cannot be a party to such an action. Spitzer states that Tom-Tom's assertion that the indication by the FAA that use of Channel 282C in the Rapid City area is unlikely and that acceptance of the condition on the No Air Hazard determination was a compromise to resolve the impasse between the petitioner and the FAA are "almost diametrically" opposed to Tom-Tom's representation to the Presiding Judge that the issuance of the No Hazard to Air Navigation certificate by the FAA resulted in their being "no longer a genuine issue of material fact for determination at hearing . . . " Spitzer contends that Tom-Tom concealed its belief that use of the channel was not possible, thus obtaining the construction permit under fraudulent circumstances. Spitzer analogizes to a case in which the Commission returned an application and rejected a minimum distance separation waiver request where the applicant had stated in its rule making comments that the allotment complied with the Commission's spacing requirements. *See Carroll - Harrison Broadcasting, Inc.*, 39 R.R. 2d 279 (1976) *recon. denied*, 67 FCC 2d 254, 41 R.R. 2d 1713 (1977). [3]

6. Spitzer states that Section 309 of the Communications Act requires that mutually exclusive applicants for a broadcast authorization be given a full hearing to determine which of the applicants will better serve the public interest, convenience, or necessity, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). It believes that Tom-Tom's request for a modification of its construction permit is based on the belief that competing applications cannot be filed for Channel 281C1 since it would conflict with the use of Channel 282C at Rapid City. However, it argues that since Channel 282C is not available for use anywhere in Rapid City, it cannot be subject to interference. Therefore, since the allotment itself is fatally flawed, it contends that the grant of the construction permit was void *ab initio*. It goes on to state that the conditions which the Commission set forth in permitting adjacent and co-channel upgrades without permitting competing applications also do not apply in this case. It states that petitioner seeks a downgrade, not an upgrade, that the proposed new channel is not in conflict with the existing use of Channel 282C, since it is not in use or capable of being used in the Rapid City area, and that Tom-Tom is not properly considered an existing licensee. *See, FM Adjacent and Co - Channel Upgrades*, 60 R.R. 2d 114 (1986). Spitzer concludes that depriving Tom-Tom of an exclusive right to a new channel will not have an adverse impact on the public interest. Thus, it contends that there are no "contervailing public interest benefits" to be gained from permitting Tom-Tom to obtain a construction permit for a new frequency while prohibiting the application of a competing applicant who has proposed virtually the same facilities as Tom-Tom.

7. Spitzer believes that Tom-Tom has provided no compelling reason to substitute an adjacent Class C1 channel for Channel 282C when there are non-adjacent Class C1 channels available which could be made available to competing applicants. Therefore, it proposes that either Channels 221C1, 254C1 or 292C1 be allotted in lieu of Channel 281C1 and that the channel be opened for competing applications. Spitzer opines that the need for reinstating its application and according it full *Ashbacker* rights is compelling since Tom-Tom now proposes virtually the same facilities that were specified in Spitzer's returned application.

8. In response, petitioner states that its request for the substitution of channels is a pragmatic attempt to take the course of least resistence to resolve the FAA issue so that it can start providing service to the public in the most expeditious and cost-effective manner. Petitioner goes into the history of its communications with the FAA concerning its application for Channel 282C, stating that its preliminary application for FAA approval at the site specified in its construction permit was granted on July 31, 1986. A revised application for FAA approval of the tower, specifying an additional 46 feet of height needed to adequately mount and secure the FM antenna to the tower, but with no change in proposed height, center of radiation, transmitting frequency or effective radiated power, was submitted to the FAA. Even though the FAA had earlier approved its preliminary application as well as two of the competing applications, petitioner was then informed that the FAA believed that use of the channel anywhere in Rapid City would cause intermodulation interference to aeronautical frequencies, based on a new computer program being used by the FAA to predict whether broadcast proposals would cause RF interference to aeronautical frequencies. In apprising the Administrative Law Judge of the status of its pending application before the FAA, petitioner requested the Commission's intervention so as to resolve the conflict. It also noted that there were five other equivalent class channels which could be substituted at Rapid City and stated that it would have no objection to the substitution if it was afforded continued cut-off protection. After discussions between the Commission and the FAA, petitioner reported to the Administrative Law Judge that the FAA had stated that it would approve the proposed facilities if Tom-Tom would agree that it would take necessary action to eliminate any electromagnetic interference caused by the proposed transmission system and that such condition would expire after one year of interference-free operation. With this condition, the FAA subsequently approved petitioner's application.

9. Petitioner's understanding is that the FAA continues to believe that interference will result from the use of Channel 282C at Rapid City. Petitioner states that it agreed to the condition only to resolve the impasse between the two agencies. Therefore, it argues that it is faced with the possibility of expending significant additional funds to construct facilities meeting specifications which are uncertain at best, and it may be required to abandon the facilities if the predicted interference does in fact occur.

10. Based on the record before us, we believe that the public interest would be served by substituting Channel 281C1 for Channel 282C at Rapid City, South Dakota, and modifying petitioner's construction permit accordingly. Spitzer has failed to demonstrate that the Commission should consider the allotment of Channel 282 to Rapid City as fatally flawed and thus petitioner's construction permit for use of such channel as void. Rather, we find that the allotment of Channel 282C to Rapid City was and continues to be a valid allotment. As pointed out by the petitioner, the FAA did not participate in the rule making which allotted the channel and, in fact, did approve several of the applications which were filed for the channel which specified full Class C facilities. No party has submitted convincing evidence that it would be impossible to construct a station on Channel 282C, only that it would be costly and difficult to construct the facility. Further, based on the record before us, we find that Tom-Tom fully disclosed all relevant information to the Commission concerning its problems with the Federal Aviation Administration. Indeed, Tom-Tom sought Commission assistance in arriving at a solution amenable to all parties concerned. Moreover, when the history of Tom-Tom's actions are viewed in light of the FAA's increasing concerns during the same period of time with interference between broadcast and air navigation facilities, our conclusion that Tom-Tom has acted at all times in good faith is strengthened. We see no benefit in requiring the petitioner to construct a costly broadcast facility when a solution exists which will enable the petitioner to expeditiously provide a new competitive service to the residents of Rapid City, while also satisfying the FAA's concerns. *See, Borger, Texas*, 4 FCC Rcd 1762 (1989).

11. However, in light of Spitzer's expressed interest in providing Rapid City with an additional FM service, we have confirmed that an additional Class C1 channel is available for allotment to Rapid City for which Spitzer may apply. Therefore, we will grant Spitzer's counterproposal to the extent of allotting an additional Class C1 channel. Thus, Spitzer is in the same position as a result of our action as it would be if we were to accept his argument, in derogation of both the factual record in this proceeding and settled principles of administrative finality, that Channel 281C1 should be made available for competing applications, except that one potential competitor, Tom-Tom, will not compete for the channel we allot today.

12. Channel 281C1 can be allotted to Rapid City in compliance with the Commission's minimum distance separation requirements with a site restriction of 6 kilometers (3.7 miles) southwest to accommodate petitioner's desired transmitter site. Channel 254C1 can be allotted to Rapid City without the imposition of a site restriction.[4] As proposed, we are also modifying petitioner's construction permit to specify operation on Channel 281C1 in lieu of its present Channel 282C.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rapid City, South Dakota	230C1, 250C1, 254C1, 262C1, 281C1

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Tom-Tom Communications, Inc. (BPH-850712SW) for a new FM station at Rapid City, South Dakota, IS MODIFIED to specify operation on Channel 281C1, in lieu of Channel 282C, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. The window for filing applications for Channel 254C1 at Rapid City, South Dakota, will open on **April 10, 1990,** and close on **May 10, 1990.**

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] After the record closed, Spitzer filed a Motion to Strike portions of petitioner's reply comments, petitioner filed an Opposition to the Motion to Strike and Spitzer filed a Reply to Opposition to Motion to Strike. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings. In addition, petitioner submitted a Petition for Expedited Action to which Spitzer responded. In light of our action herein, these pleadings are moot. Spitzer also filed with the Commission a Petition to Rescind or Revoke Construction Permit (BPH-850712SW) and Petition for Acceptance of Application *Nunc Pro Tunc* (BPH-850712E6). These pleadings, and Tom-Tom's responses thereto, to the extent they are not mooted by our action herein, are more appropriately considered by the FM Branch.

[2] When the Commission was considering the allotment of Channel 282C to Rapid City in MM Docket 84-504, neither the petitioner nor any other party raised an issue which would have alerted us to a potential problem with either the use of full Class C facilities on Channel 282 or with FAA approval of such facilities. In this connection, we note that Spitzer states that the transmitter site and Class C1 facilities specified in its application, were the result of a 10 year search for a suitable transmitter site. Since Spitzer's application was filed in July of 1985, we presume, based on this statement, that the search began in 1975. Therefore, we are at a loss to explain why Spitzer did not participate in the rule making which culminated in the allotment of Channel 282C to Rapid City, even though the rules permitting Class C1 allotments were in effect and parties were also on notice that applicants were required to specify minimum Class C facilities when applying for such allotments.

[3] The cited case is not analogous. In *Carroll - Harrison, supra*, the applicant requested a waiver of the Commission's minimum distance separation requirements in order to accomodate a preferred site. The applicant made no showing that no short-spaced sites existed. Rather, it argued that the waiver should be granted because use of its preferred site would, in addition to providing the required 70 dBu signal over its community of license, also provide such service to another community, and a 60 dBu signal to most of Harrison and Carroll Counties. The Commission noted that the applicant had stated in the rule making proceeding that the allotment could be made in compliance with the Commission's minimum distance separation requirements and stated that the applicant had not shown any change in circumstances. However, the basis for the denial of the waiver request was not its earlier statement that the channel allotment met the spacing requirements but that it had failed to adequately justify the grant of the waiver request. The Commission thus stated:

> When an applicant requests a waiver of the minimum spacing requirements, it must make a threshold showing that other suitable non-short spaced sites are unavailable. (If suitable non-short spaced sites are available, then a waiver is clearly unnecessary.) The applicant has not attempted to make such a showing. Instead, the applicant has argued that a waiver is warranted so that it would supply service to areas outside of its proposed community of designation. While it may be true that these areas outside of Jewett do not have a local aural service, that is not sufficient reason to justify waiver of eight miles of short spacing. 39 R.R. 2d 280 (1976)

[4] The coordinates for Channel 281C1 are North Latitude 44-01-50 and West Longitude 103-15-34. The coordinates for Channel 254C1 are North Latitude 44-04-48 and West Longitude 103-13-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-128

In the Matter of

Amendment of Section 73.202(b),	RM-6655
Table of Allotments,	RM-6996
FM Broadcast Stations.	
(Marlin and Dublin, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1990; Released: February 23, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of KRZI, Inc. (petitioner), licensee of Station KRXX(FM), Channel 225A at Marlin, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4826 (1989), proposing the substitution of Channel 225C2 for Channel 225A at Marlin and the modification of Station KRXX(FM)'s license accordingly. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Robert V. Barnes filed comments and a counterproposal expressing an interest in applying for the allotment of Channel 225C3 at Dublin, Texas, as that community's first local FM service.[2] In response to the counterproposal the petitioner suggests that the conflict between the mutually exclusive proposals can be resolved by allotting Channel 285C3 to Dublin.

2. We have confirmed that Channel 285C3 is available for allotment to Dublin. Channel 285C3 can be allotted to Dublin in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.4 kilometers (4 miles) southeast of the city. [3] The site restriction is necessary in order to avoid a short spacing to an outstanding construction permit for Station KEAN-FM, Channel 286C at Abilene, Texas.[4] Based on the availability of this alternative channel at Dublin, we shall proceed with the proposed allotment of Channel 225C2 at Marlin.

3. Channel 225C2 can be substituted for Channel 225A at Marlin, consistent with Section 73.207 of the Commission's Rules, at the site specified by the petitioner.[5] Therefore, as requested, we are modifying the license of Station KRXX(FM) at Marlin to specify operation on Channel 225C2 in lieu of Channel 225A in accordance with Section 1.420(g) of the Commission's Rules.

4. We believe the public interest would be served by the allotment of Channel 285C3 at Dublin, Texas, and the substitution of Channel 225C2 for Channel 225A at Marlin, Texas, thereby providing a first local FM service at Dublin and a first wide coverage area FM service at Marlin. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Dublin, Texas	285C3
Marlin, Texas	225C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KRZI, Inc., for Station KRXX(FM), Marlin, Texas, IS MODIFIED, to specify operation on Channel 225C2 in lieu of Channel 225A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. The window period for filing applications for Channel 285C3 at Dublin, Texas, will open on **April 10, 1990,** and close on **May 10, 1990.**

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested to the following:

Radiosungroup of Texas, Inc.
226 Third Avenue, North
Nashville, TN 37201

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Dublin, Texas, has been added to the caption.

[2] Public Notice of the counterproposal was given on September 20, 1989, Report No. 1796.

[3] The restricted site coordinates are 32-02-57 and 98-12-24.

[4] Station KEAN-FM at Abilene, Texas, must be licensed in accordance with an outstanding construction permit specifying a site change before Channel 285C3 can operate at Dublin. We shall serve the Abilene licensee with a copy of this *Order*.

[5] Petitioner's specified site is located 26.8 kilometers (16.7 miles) west of the city at coordinates 31-22-48 and 97-09-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TOURS BROADCASTING COMPANY
Shingle Springs, California

File No. ARN-860930MC

For Construction Permit for
a New FM Station on
Channel 271A in
Shingle Springs, California

ORDER

Adopted: January 22, 1990; Released: February 23, 1990

By the Commission:

1. On January 15, 1987, the Acting Chief, FM Branch, returned as untimely filed, an application submitted by Tours Broadcasting Company (hereinafter "Tours"). On March 23, 1988, the Chief, the Audio Services Division, acting pursuant to delegated authority, denied, in a *Hearing Designation Order*,[1] a petition for reconsideration (hereinafter "Petition I") of that action. The Commission has before it now for consideration Tours' April 25, 1988 petition for reconsideration (hereinafter "Petition II") of the action taken in the *Hearing Designation Order*.[2]

2. Petition II simply restates arguments made in Petition I. We have reviewed the staff's action denying that petition and find no error. [3] Accordingly, pursuant to Section 1.106(j) of the Commission's Rules, 47 C.F.R. Section 1.106(j), IT IS ORDERED that Petition II IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Hearing Designation Order* in Shingle Springs, California, MM Docket No. 88-100, 3 FCC Rcd 1677 (1988).

[2] Tours' petition for reconsideration is being referred to the Commission pursuant to 47 C.F.R. § 1.104(b) which provides "that a petition for reconsideration of an order designating a matter for hearing will in all cases be referred to the Commission." *See also* 47 C.F.R. § 1.106(a)(1).

[3] As noted in Comments submitted by Lobster Communications Corporation, in response to Petition II, Tours' original application also fails to contain a certification of transmitter site availability as required by paragraph 22 and paragraph 2(d) to Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). Furthermore, the topographic site map submitted with the application does not comply with requirements established by the April 5, 1985 *Public Notice*, Mimeo 3693 concerning transmitter site map submissions. Pursuant to the *Report and Order, supra*, either of these defects would render Tours' application unacceptable for tender.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO MOBILE CORPORATION — File No. 22749-CD-P/L-85

For authority to construct additional facilities in the Public Mobile Service on Frequency 152.24 MHz for Station KUO563 at Madison, Florida

MOBILPHONE & BEEPER, INC. — File No. 24481-CD-P/L-85

For authority to construct additional facilities in the Public Mobile Service on Frequency 152.24 MHz for Station KUS411 at Madison, Florida

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1990; Released: February 23, 1990

By the Chief, Mobile Services Division:

1. Metro Mobile Corporation ("Metro") filed its captioned application (File No. 22749-CD-P/L-85) on April 3, 1985, seeking authority to add an additional transmitter location for a one-way facility to an authorized station on frequency 152.24 MHz in the Public Mobile Service ("PMS") at Madison, Florida.[1] Mobilphone & Beeper, Inc. ("Mobilphone") filed its captioned application (File No. 24481-CD-P/L-85) on August 19, 1985, seeking authority to add an additional transmitter location for a one-way facility to an authorized station on frequency 152.24 MHz in the PMS at Madison, Florida.[2] Metro and Mobilphone have authorized PMS paging stations on frequency 152.24 MHz in various locations in Florida and Georgia.

I. BACKGROUND

2. On July 22, 1985, Mobilphone filed a "Petition to Dismiss or Deny" against Metro's application; on October 25, 1985, Metro filed a "Petition to Dismiss or Deny" against Mobilphone's application. Responsive pleadings were filed. Because the captioned applications are electrically mutually exclusive, they were set for lottery.[3] Mobilphone, on May 23, 1986, filed a "Petition for Comparative Hearing" and requested that, pursuant to Section 22.33(b) of the Commission's Rules,[4] the captioned applications be designated for hearing in lieu of a lottery.[5] Mobilphone simultaneously submitted with its hearing petition a minor amendment to its captioned application purporting to show subscriber demand for its expanded service.[6] To date, the lottery has not been held.

II. DISCUSSION

3. After a thorough review of the applications and the hearing request, we conclude that Mobilphone has failed to satisfy the burden of demonstrating demand by existing subscribers for expanded service and thus has failed to show that it is eligible for a comparative hearing. Commission policy holds that selection by lottery among mutually exclusive applicants is the general rule, and that exceptions to the rule are to be strictly construed and enforced. *See, e.g., Mobile Phone of Texas*, Mimeo No. 2728 (Mob. Serv. Div. released Feb. 22, 1985). Section 22.31(c)(1) requires first that the applicant requesting a comparative hearing satisfy certain geographical and frequency requirements. *Supra*, at note 4. These requirements have been satisfied; Mobilphone's proposed transmitter at Madison is located within 40 miles of an existing location and is for the same frequency.

4. Section 22.33(c)(1), however, further requires that a requesting applicant demonstrate a demand by existing subscribers for expanded service. We find that Mobilphone's showing set forth in note 6, *supra*, is not sufficient to justify a comparative hearing. We have previously denied hearing requests on the ground that they did not submit specific information which is necessary to comply with Section 22.33(c)(1). *See Bay Springs Telephone Co.*, 3 FCC Rcd 2133 (Mob. Serv. Div. 1988) (mere assertion that all of subscribers contacted, signed written requests for proposed expanded service found unpersuasive); *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (mere representation that expanded service is needed in response to subscriber demand is insufficient); *Speed Call, Inc.*, 2 FCC Rcd 6530 (Mob. Serv. Div. 1976) (subscriber survey forms submitted to indicate demand were found insufficient). By contrast, in *RAM Communications of Michigan, Inc.*, Mimeo No. 4848 (Mob. Serv. Div. June 3, 1986), the Mobile Services Division found that a comparative hearing had been justified when "specific information as to numbers of units, area covered and the purpose to be served by the present application" had been produced. In this case, Mobilphone has not presented specific information to identify either the proposed subscribers or the area to be served. Therefore, we deny Mobilphone's request to designate a comparative hearing. Mobilphone's captioned application and Metro's captioned application will be included in a lottery to be announced in a subsequent public notice.[7]

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the "Petition for Comparative Hearing" filed by Mobilphone & Beeper, Inc. IS DENIED.

6. IT IS FURTHER ORDERED that a lottery between the captioned applications of Metro Mobile Corporation and Mobilphone & Beeper, Inc. SHALL BE HELD at a time and place to be specified in a subsequent public notice.

7. IT IS FURTHER ORDERED that the Petitions to Dismiss or Deny filed by Metro Mobile Corporation and Mobilphone & Beeper, Inc. ARE HELD IN ABEYANCE pending the outcome of the lottery.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Metro's application was listed on Public Notice, Rpt. No. PMS-85-22 (released June 19, 1985).

[2] Mobilphone's application was listed on Public Notice, Rpt. No. PMS-85-36 (released Sept. 25, 1985).

[3] *See* Lottery Notice, Mimeo No. 4090 (released Apr. 25, 1986).

[4] In actuality, Mobilphone filed its hearing petition under the wrong subsection of the Commission's Rules. Section 22.33(b) was renumbered and is now Section 22.33(c). *See* 50 Fed. Reg. 5583 (Feb. 11, 1985). This renumbering was done before Mobilphone filed its captioned application and hearing petition. Section 22.33(c)(1) of the Commission's Rules states that a mutually exclusive applicant is eligible to request a comparative hearing in lieu of the random selection procedure if it is:

> "an applicant proposing to add one or more transmitter locations to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter locations on those frequencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service . . . ".

[5] Public Notice, Rpt. No. PMS-86-30 (released Apr. 23, 1986), incorrectly listed only Mobilphone's captioned application as mutually exclusive without listing Metro's captioned application. Public Notice, Rpt. No. PMS-86-32 (released May 7, 1986), corrected the oversight and listed both of the captioned applications as mutually exclusive. As a result, Mobilphone's "Petition for Comparative Hearing" was timely filed.

[6] The following constitutes Mobilphone's entire demand showing which is appended as Attachment A to its hearing request:

Mobilphone & Beeper, Inc. has had request for service from existing subscribers on the frequency 152.24 MHz, station KUS411, for service in the Madison, Florida area. The following is a breakdown of existing KUS411 subscribers who have expressed desire for expanded coverage to include the proposed Madison, Florida service area:

Occupation	No. of Subscribers	No. of Units
Medical	3	5
Industrial	12	15
Miscellaneous	5	15

[7] Under Section 1.823(b) of the Commission's Rules, petitions to deny filed against applications in the PMS will not be reviewed prior to conducting the random selection.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 23, 1990

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not published in the FCC Record (*See* 0.445(a) of the rules).

These decisions are available for public inspection. Periodically, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

Golden Triangle Media Partners - Request for Refund of $1800 Filing Fee Denied - Application for New FM Station at State College, MI (January 24, 1990)

Eric R. Hilding - Request for Refund of $6000 Hearing Fee Denied - Application for New FM Station at Morgan Hill, CA (MM Docket No. 88-205) (January 24, 1990)

Perdido Broadcasting Corporation - Request for Refund of $1800 Filing Fee Granted - Application for New FM Station at Garden City, IN (January 25, 1990)

Smith Mountain Lake Radio - Request for Refund of $6000 Hearing Fee Denied - Application for New AM Station at Moneta, VA (MM Docket No. 89-356) (January 25, 1990)

KMHL Broadcasting Company - Request for Waiver Granted - Application to Correct Site for AM Station KMHL, at Marshall, MN (January 25, 1990)

Boles American Indian, A Partnership - Request for Refund of $6000 Hearing Fee Granted - Application for New FM Station at Post, TX (MM Docket No. 89-60) (January 29, 1990)

H. James Sharp - Application for Review of Managing Director's Decision of January 4, 1989, and Commission Order Adopted July 13, 1989 Dismisssed - Application for a New TV Station at Panama City, FL (February 1, 1990)

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER MICKEY WILLIAMS, ACTING CHIEF, FEE SECTION PH. 632-0241

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 23, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR FACSIMILE STORE AND FORWARD SERVICE

On December 15, 1989, US West, Inc. (US West) filed a comparably efficient interconnection (CEI) plan for competitive providers of facsimile store and forward (Fax-SF) service, stating that it plans to provide Fax-SF service on an integrated basis. US West states that this service will increase the use of facsimile machines by providing customers with new options for sending and receiving facsimile messages. In particular, US West's Fax-SF service will allow customers to fax messages to multiple locations or to store incoming and outgoing messages, thus providing customers with additional control and security for fax messages. US West states that customers will use the audio capabilities of its Enhanced Services Platform to interact with the Fax-SF service.

In this filing, US West describes how it will satisfy the Commission's CEI parameters. US West also states that it will account for the joint and common costs of the Fax-SF service pursuant to its Part 32 cost allocation manual. In addition, US West describes its plans for complying with the other *Computer III* nonstructural safeguards concerning the use of customer proprietary network information, nondiscrimination reporting, and disclosure of network information. As required in the *Computer III* proceeding *Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988), the Commission must approve this CEI plan before US West can begin implementing the proposed service.

Interested parties should file comments on this plan by **March 15, 1990,** and reply comments by **March 26, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of US West's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the Matter of

Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other celluar rules

NOTICE OF PROPOSED RULE MAKING

Adopted: January 11, 1990; Released: February 6, 1990

By the Commission:

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I. INTRODUCTION

1. The Commission established initial rules for the filing and processing of applications for cellular systems in *Cellular Communications Systems (Cellular Systems)*, 86 F.C.C. 2d 469 (1981), *modified*, 89 F.C.C. 2d 58 (1982), *further modified*, 90 F.C.C. 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983). Since then, applications for the provision of cellular service in 306 Metropolitan Statistical Areas (MSAs) and New England County Metropolitan Areas for the New England States (NECMAs)[1] and 428 Rural Service Areas (RSAs) have been filed, and we are in the process of licensing these systems. These initial cellular systems have been granted a five year period during which the systems may be expanded within the MSAs and RSAs, free from the filing of competing applications.[2] We intended to begin accepting applications for the remaining unserved areas once the five year fill-in period expired and procedures were established for accepting these applications. The five year fill-in period has already expired or is about to expire in a number of markets. Rules for the acceptance, processing and selection of applications for service to unserved areas have not been established. By this notice we seek public comment on proposed rules for the filing, processing and selection of applications for unserved areas after the five year fill-in periods have run. These unserved areas are largely within the borders of the MSAs and RSAs. Comment is also sought on other proposed rule changes dealing with existing licensees. In particular, we propose that existing CGSAs generally be made coterminous with 39 dBu contours, that RSA licensees be permitted to allow others to file inside the RSA during the five year fill-in period, that the filing of petitions to defer the initiation of wireline service for MSAs and RSAs not be permitted, and that a rule be adopted outlining Commission policy on interference protection for *de minimis* 39 dBu contour extensions outside the MSA or RSA.

II. BACKGROUND

2. In *Cellular Systems*, we decided that cellular applications for the top 30 markets should be filed on a Commission - announced date certain [3] by geographic markets defined as Standard Metropolitan Statistical Areas (SMSAs).[4] In *Cellular Lottery Order*, 98 F.C.C. 2d 175 (1984), *modified*, 101 F.C.C. 2d 577 (1985), *further modi-*

fied, 59 Rad. Reg. 2d (P&F) 407 (1985), *aff'd in part and rev'd in part, Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987), the Commission stated that cellular operators would be allowed to expand their Cellular Geographic Service Area (CGSA)[5] within the boundaries of the relevant MSA without competing applications being filed against them during the initial nationwide cellular licensing period. *Cellular Lottery Order*, 98 F.C.C. 2d at 204, n.81. The Commission also stated that, after the initial filing periods had passed, all remaining frequency blocks in areas which had not been applied for would be open for filing without regard to the wireline frequency set-aside adopted in *Cellular Systems*, 86 F.C.C. 2d at 487-93.[6] For this remaining category of applications (i.e., unserved areas), we stated that we intended to use regular notice and cut-off procedures instead of a date certain filing window. *Cellular Lottery Order*, 98 F.C.C. 2d at 204-205.

3. In a subsequent order, *Rules for Rural Cellular Service (Second Report and Order)*, 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989), we stated that licensees and permittees could file fill-in applications within their MSAs without competing applications being filed against them for a period of five years from the date the first construction permit is granted in each MSA. After this five year period any party could file applications for unserved areas within an MSA once procedures for filing the applications were established. *Second Report and Order*, 2 FCC Rcd at 2307-09. On reconsideration we provided licensees with a protected fill-in period of five years starting from the date of their respective initial construction authorizations. *Order On Reconsideration of Second Report and Order, supra*, 4 FCC Rcd at 5380. *See also* Section 22.31 (a)(1)(i) of the rules. This made the MSA fill-in rule consistent with the RSA fill-in rule. Section 22.31(f), discussed *infra* at para. 6.

4. In the *Second Report and Order*, 2 FCC Rcd at 2309, we stated that the procedures for selecting the applications for unserved areas would be established at a later date. In addition, we stated that a public notice would be issued announcing the initial construction permit dates and the expiration dates of the five year fill-in period for each MSA. *Id.* at n. 17. We also codified our policy that cellular radio applications may only be filed on the dates specified by the Commission, Section 22.6(b)(3), and determined that we would subsequently announce when the applications for unserved areas could be filed for each MSA. *Id.*[7] On reconsideration we noted that applications for unserved areas filed after the expiration of the five-year period would not be accepted, pending completion of a proceeding establishing rules for the processing and selection of applications for unserved areas. *See Order on Reconsideration of Second Report and Order*, 4 FCC Rcd at 5383, n. 22. *See also Second Report and Order*, 2 FCC Rcd at 2309, n. 17.

5. We also reaffirmed, in *Order on Reconsideration of Second Report and Order*, 4 FCC Rcd at 5380-81, that the wireline frequency set aside should not be extended to applications for unserved areas. We stated that the clear intent of our previous orders was to eliminate the wireline set aside after the initial filings for all markets had been received. Section 22.902 (b) of the Rules provides:

> in the final cellular application phase for any initially unapplied for or unlicensed area, either within or without a Metropolitan Statistical Area (MSA) or New England County Metropolitan Area (NECMA), a cellular applicant may apply for either frequency block and the applicant shall indicate in its application which it prefers to be assigned.

6. In a series of decisions, we established fixed RSA boundaries for the purpose of accepting RSA applications, and procedures and policies for evaluating RSA applications.[8] Additionally, we established a period of five years during which an RSA licensee could file applications to expand its CGSA or propose other CGSAs within the RSA without being subject to competing applications. *See Rules for Rural Cellular Service (Fifth Report and Order)*, 3 FCC Rcd 6401 (1988), *recon. pending*. *See also* Section 22.31 (f) of the rules. We stated that this period would start from the date of the grant of the licensee's original authorization for the RSA. We also allowed a proposed transferee to acquire the fill-in rights of the original licensee. *Id.* at 6402. In order to expedite application processing in RSAs, we also established that mutual exclusivity for initial RSA applications would be established by considering all applications within an RSA as mutually exclusive, regardless of whether or not their CGSAs actually overlap. *Id.* at 6402. However, we established that after the five year fill-in period had expired, mutual exclusivity would be determined in accordance with traditional principles, i.e., whether the CGSAs overlap in such a way that grant of one would preclude the grant of one or more of the other applications. *Id.* at 6402.

III. PROCEDURES FOR PROCESSING OF APPLICATIONS FOR UNSERVED AREAS

A. WHEN MAY APPLICATIONS BE FILED

1. FILING PERIOD

7. As previously discussed, we have determined not to accept applications to serve post-fill-in unserved areas until the completion of the instant Rule Making proceeding.

8. At this time, we do not have sufficient information to determine the extent of any demand for any remaining unserved areas. However, the Commission has already received some applications to serve unserved areas in portions of the country where the five-year fill-in period has expired.[9] Therefore, we can conclude that there are some applicants who believe that sufficient demand exists in unserved areas to justify building systems in these areas. In addition, as population centers expand, demand in the future could justify the addition of a new system or systems in areas which currently have low population centers. Moreover, with our *Liberalization of Technology and Auxiliary Service Offerings in the Cellular Radio Service (Auxiliary Cellular Order)*, 3 FCC Rcd 7033 (1988), *recon. pending*, we have increased the permissible uses of cellular frequencies. All of these factors combined lead us to tentatively conclude that applications to serve unserved areas should be filed in response to perceived demand after the end of the five-year fill-in period applicable to the frequency block for which the application is made. Under this procedure the Commission would not need to announce a filing window for the acceptance of applica-

tions. Rather, applicants would determine when they are ready to file for an area based upon projected demand and other business reasons. This proposal recognizes the uncertain economic value of any particular unserved area and will prevent forced filings that may result from Commission-imposed deadlines. This procedure would permit the filing of applications when there is a perceived need for the service, rather than when the Commission *sua sponte* establishes a window for the filing of applications.[10] Thus, we believe that this proposal would be more efficient than date certain filings.[11]

9. However, for those markets where five year fill-in periods have already expired, or will expire prior to the effective date of the final rules adopted in this proceeding or within 90 days after the effective date of the new rules, we seek comment on whether a date certain filing or a filing window should be established. For this category of geographic areas, there may be good reasons simply to announce filing windows as we have done in the MSAs and RSAs. Since approximately 100 markets potentially fall within this category, we are concerned that the staff may be overburdened if all applications for all markets are filed at the same time. In addition, the use of date certain filing windows should reduce whatever confusion has arisen because of the delay in adopting these rules. Under this procedure, if no one files during the window, an applicant could file for the area at any time thereafter, subject to the notice and cut-off rules described in the next section. Finally, the date certain filing procedure can provide a sufficient period of time subsequent to the effective date of the rules and prior to the filing window or date to permit the Commission and all potential applicants to determine which areas are unserved.

10. On the other hand, the announcement of filing windows for markets in which the five year fill-in period has expired could delay service to the public. We request comment whether the approach set forth in paragraph 8 should apply to all markets, i.e., whether any applications filed for unserved areas in which the five-year fill-in period has run may be filed at any time after the effective date of these rules. We request comment on this proposal including the advantages and disadvantages such an approach would have for applicants, existing licensees, the public and the Commission.

2. MUTUAL EXCLUSIVITY; NOTICE AND CUT-OFF PROCEDURES

11. For those markets where the date for filing an application in a particular location is triggered by the end of a five-year fill-in period, we propose that applications for unserved areas would be filed under traditional cut-off procedures. Notice and cut-off procedures are the traditional method the Commission has utilized in a variety of different licensing processes to define the existence of competing applications. The procedures give potential competing applicants a fair opportunity to file for an unserved area when, by chance, another applicant has simply beaten a competitor to the door with an application. At the same time, the cut-off period is fair to the first filer by establishing a date certain beyond which no competing applications may be filed.

12. We tentatively conclude that once we have licensed systems inside MSAs and RSAs and the five year fill-in periods expire, the geographic boundaries we created for purposes of initial licensing are no longer significant and we propose their elimination. We will have a relatively mature structure of licensed systems throughout the country operating within the confines of established CGSAs. Nevertheless, there will be some geographic areas of the country which do not fall within established CGSAs. For these unserved areas we propose to eliminate the constraints of geographical boundaries. Therefore, applicants could propose systems in accordance with perceived economic needs and not boundaries created by the Commission. This proposal has the advantage that applicants can effectively propose which areas of the country they want to serve without being constrained by Commission-imposed boundaries. Under this proposal applications for unserved areas would be considered mutually exclusive in accordance with traditional principles, i.e., if they are for the same frequency block and their proposed CGSAs overlap in such a way that a grant of one would preclude the grant of one or more of the other applications. *See generally Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945). *See also* Rule 22.31(a)(1). We believe that this is the most efficient way of evaluating mutual exclusivity in this context. However, we also perceive difficulties in administering this proposal because it would be difficult to establish which applications are mutually exclusive if we do in fact receive a large number of applications for unserved areas. This could delay providing service to the public.

13. In the alternative we question whether it would be beneficial to maintain the MSA boundaries for a limited period of time. This alternative would maintain MSA boundaries[12] for one year after adoption of rules for the filing and processing of applications for unserved areas. We believe that this proposal has an advantage in that it promotes efficient processing of applications for unserved areas during the transition from licensing within geographic areas to not having any geographical boundaries. However, this would have the disadvantage of establishing artificial boundaries for applicants, which would not necessarily reflect economic realities, and thus, would probably constrain applicants from creating more efficient service proposals. During this one year period all applications filed within the MSA on the same frequency block would be considered mutually exclusive regardless of whether or not their CGSAs actually overlap.[13] In the past we have found that retention of geographical boundaries along with the establishment of mutual exclusivity within the entire MSA would expedite application processing. *See e.g., Rules for Rural Cellular Service (Fifth Report and Order)*, 3 FCC Rcd 6401 (1988). We request comments on these proposals and any alternative methods the public may wish to suggest.

14. Under either proposal to be considered, mutually exclusive applications must be filed within the established time frames or cut-off procedures. We additionally propose that an application be considered mutually exclusive and eligible for random selection[14] with the first-filed application if the application is received by the Commission in a condition acceptable for filing within 30 days after the date of public notice listing the first of the conflicting applications as accepted for filing. This is considered the "cut-off date". We propose a 30-day time frame in order to promote our long-standing goal of encouraging the provision of prompt service to the public. We believe that a 30-day period strikes a reasonable balance between providing prompt service and giving competing applicants a reasonable period of time to prepare and file a competing application. We request com-

ments on the reasonableness of this time period or whether a different time-frame should be adopted. *See* Proposed Rule 22.31(b)(2)(iii).

15. Whenever three or more applications are mutually exclusive we propose that the public notice date of the earliest filed application establish the cut-off date. This would be the case regardless of whether subsequently filed applications are directly mutually exclusive with the first-filed application. This rule, which is known as the "daisy chain" rule,[15] is consistent with the practice we employ in the Public Land Mobile Service. We believe that the cut-off procedures used for these services would be the most effective means for dealing with mutually exclusive applications for unserved areas. Mutually exclusive cellular applications filed after the appropriate cut-off date would be returned without prejudice and would be eligible for refiling only after final action is taken by the Commission with respect to the previously filed application(s) provided it is not mutually exclusive with the newly granted application. *See* Sections 22.31(c) and (d). We request comments on this proposal as well as any alternatives which may be appropriate.[16]

16. We are also proposing for the sake of administrative efficiency, and in order to effectively evaluate mutually exclusive applications, that an application propose service to only one CGSA. This CGSA may include multiple overlapping 39 dBu contours. Additional CGSAs may be applied for in separate applications. We believe that it would be administratively cumbersome to allow applicants to propose multiple CGSAs in the same application. Multiple CGSAs in the same application could create unworkable mutually exclusive applications, where, because of a possible "daisy chain" effect, it would be extremely difficult to determine which applications are mutually exclusive. This in turn, would only create additional processing delays resulting in delayed service to the public. *See* Proposed Rule 22.924.

17. After the five year fill-in period expires, licensees may need to make minor modifications to their systems in order to meet demand or unexpected service needs. We tentatively conclude that under certain circumstances it may be beneficial to allow licensees some flexibility to modify their systems without competing or mutually exclusive applications being filed against them. Therefore, we seek comment on whether we should allow a licensee to propose a minor change to its system without mutually exclusive applications being filed against its proposal. An analogous case can be found in the Public Land Mobile Service where licensees can enlarge their reliable service area by less than one mile without public notice and without competing applications being filed against them. *See* Section 22.27(c)(1). Specifically, we request comment on what the definition of a minor change should be for this purpose.

B. WHAT GEOGRAPHIC AREA APPLICATIONS MAY COVER

1. CELLULAR GEOGRAPHIC SERVICE AREA

18. As stated previously, until now we have divided the country into geographic areas, MSAs and RSAs, in order to establish a convenient, orderly method to license cellular service and to ensure that licensees retained flexibility for five years to expand their systems. After the completion of the nationwide licensing process and the expiration of the five-year fill-in period in each market, these geographic boundaries may no longer serve a useful purpose.[17]

19. Until now, applicants for initial licenses have proposed a CGSA, which defined their expected area of operation. Moreover, applicants were required to identify the 39 dBu contour or contours within the CGSA and within which the applicant would provide reliable service to the public. The CGSA concept was adopted as a means of providing expansion opportunities for cellular systems as demand and need arose. In all markets we required applicants to provide cellular service to 75% of their CGSA within 3 years from the grant of their authorizations. *See* Sections 22.903(a),(b), and 22.43(c)(5) of the rules. We also established that failure to provide 75% coverage of the CGSA within 36 months of the initial license grant requires that the licensee reduce the boundaries of the CGSA to meet the 75% coverage requirement. *See* Section 22.43(c)(5).

20. In addition, for markets below the top 90 we required that a proposed CGSA cover at least 75% of either the land area or population of the market. This 75% coverage requirement was not applicable to the RSAs. *See* Section 22.903 (a) of the rules. For RSAs we permitted the applicant to determine the CGSA without having to cover a percentage of the land or population of the RSA. However, RSA applicants still had to cover 75% of the CGSA with 39dBu contours. *See* Section 22.903 (a)(1). Subsequently, we established that licensees had five years to fill-in unserved areas within their MSAs or RSAs without having to compete with other applicants for the same market areas.[18]

21. We tentatively conclude that proposed CGSAs which extend beyond the 39 dBu contours in unserved areas will not serve a useful purpose and therefore should not be permitted. If an applicant believes expansion of its system is warranted at a later time, it will be free to file for that area when it deems appropriate. We see no reason, in the context of licensing unserved areas, to protect future expansion areas. Existing and future MSA and RSA licensees will have been given sufficient time to expand their systems in an efficient manner. Therefore, we propose for applications for unserved areas that the CGSA must be coterminous with the 39 dBu contours. This general rule would be subject to an exception for a *de minimis* extension into an area in which the fill-in period has not expired. *See infra* para. 30 and Proposed Rule 22.903(f). This requirement would apply equally to applications filed by existing MSA and RSA licensees after the five year fill-in period has expired.

2. DEFINITION OF UNSERVED AREA

22. A critical question that will arise in evaluating applications for unserved areas is the definition of the term "unserved". Unserved areas will encompass areas of the country where no CGSA or 39 dBu contour covers these areas. *See* Proposed Rule 22.2. In addition, whenever a previously authorized 39 dBu contour exists, that area is not "unserved". However, there may be areas of the country where, after the five-year fill-in period has run, an authorized CGSA covers a particular area but the licensee has not extended its actual coverage area into the full boundaries of its CGSA. This may occur because the rules require only that the licensee cover at least 75% of the CGSA within three years, but are silent with respect to any further coverage requirements. We have not con-

ducted a thorough survey of existing licensees whose five year fill-in periods have run and therefore have no data as to the number of cases where a CGSA includes significant areas not actually served by a given licensee.

23. Nevertheless, we believe it is important at the outset to set the ground rules for resolving disputes regarding "unserved" areas within a CGSA but outside a 39 dBu contour. Although virtually all areas within the CGSAs of larger MSAs will probably be covered by 39 dBu contours at the end of the five-year fill-in periods, this is not necessarily the case in smaller MSAs or in the RSAs. For instance, many maps submitted with the applications for smaller markets include within the CGSA, but not within a 39 dBu contour, thin strips of territory designed to provide coverage to highways. It may be difficult to serve these thin strips of land without expanding the CGSA. We are not concerned with these situations at present because these licensees have five-year fill-in rights in which to expand their CGSAs to cover these areas. Nonetheless, if the licensee does not so expand its CGSA within five years, but is permitted to protect these "unserved" portions of a CGSA, a company which is interested in the service area would not be able to apply to serve the area. Licensees and permittees have had three years from the grant of their authorizations to cover 75% of their CGSA. They have also had an additional two years for a total of five years to expand their CGSAs free from the filing of competing applications.

24. We do not believe it to be in the public interest to permit a current licensee to protect unserved territory for an unlimited period of time in an area in which service to the public is not provided, simply because the territory has been designated as part of a CGSA. If some other carrier desires to serve such an area and the current licensee does not, the new carrier should be given an opportunity to serve customers in that unserved area. In light of the fact that the carrier has had five years to expand its system and is required to cover 75% of the CGSA within three years from the license grant, we propose that in the future, existing CGSA boundaries of current licensees should be made coterminous with 39 dBu contours, the actual boundaries of the reliable service area for cellular customers. The newly defined CGSA would not include CGSA or contour extensions outside the MSA or RSA, until such time as the licensee whose 39 dBu contour includes *de minimis* coverage of the extension area is eligible for interference protection in that area.[19] We request comments with respect to this proposal.[20]

25. We also request comment on the procedures which should be used to accomplish the goal of reducing existing CGSA boundaries to be coextensive with 39 dBu contours. Section 316 (a)(1) of the Communications Act provides:

> Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, . . . No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification . . . .

Therefore, in order to modify an existing license, as would be the case if we required a licensee to reduce its CGSA, we must provide notice to the licensee and an opportunity to protest such modification. Licenses may also be modified through Rule Making. *See WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966); *Upjohn Co. v. Food and Drug Admin.*, 911 F.2d 1583 (D.C. Cir. 1987). We request comment on two options for modifying a licensee's authorized CGSA. First, through this Rule Making we could alter CGSAs in existence at the end of the five-year fill-in periods to be coterminous with 39 dBu contours (not including contour or CGSA extensions outside the MSA or RSA for which the licensee is not eligible for interference protection). We propose that such action would become effective at the end of the five-year fill-in period or at least one year after the effective date of this Rule Making proceeding, whichever is later, to afford licensees notice of the action and an opportunity to expand their service areas within their CGSAs to fully serve customers within the CGSA boundary. *See* Proposed Rule 22.903(b)(1). Second, we could order this modification to take place in the final order in this Rule Making proceeding to become effective on the grant of the first renewal license of the licensee in question. Although this proposal may increase the time during which an unserved area within a CGSA remains unserved, this proposal may provide a more orderly means of modifying CGSAs. We request comment on the technical and legal ramifications of these proposals, or any other proposals, which would serve the goal of ensuring that persons in unserved areas can have access to cellular service at the earliest possible date.[21]

26. We also request comment on whether we should establish a minimum geographical coverage requirement for new applications for unserved areas. We seek comment on what the requirement should be. For instance, should we require applicants to propose systems which are no less than 10 square miles? The reason for this proposal would be to try to deter speculative applications, or applications filed for the mere purpose of preventing someone else from filing or for the mere purpose of entering the lottery, rather than to provide service to the public.

27. We also propose to exclude from the definition of unserved areas "dead spots" within a licensed cellular service area, which is an overlapping series of concentric circles (39 dBu contours) which cover a geographic area.[22] "Dead spots" can occur where for reason of terrain or other technical reasons, a customer cannot receive service in a portion of the service area. We do not propose to include these areas within the term "unserved areas". Generally, a cellular carrier desires that no "dead spots" occur, but, due to technological, topographical and/or economic considerations, has not yet been able to cover the "dead spot." We do not believe it would be in the public interest to treat these areas as "unserved" since it is likely that either the carrier will cover the "dead spot" when it can or it is not economically or technically feasible for anyone to do so. We request comment on how to define "dead spots" so that they may be excluded from

the definition of an unserved area. We request comment on all our proposals to define unserved areas mentioned above.

3. CONTOURS

28. If we adopted the proposal of retaining geographical boundaries for one year after adoption of rules for unserved areas, we also propose that applications for these areas will not be allowed to have 39 dBu contours (which will be coextensive with the CGSA) extending beyond the borders of the MSA. However, a *de minimis* 39 dBu contour extension could be requested if supported by a waiver request and an engineering justification, identical to the waiver requests described below.

29. If we eliminate geographical boundaries, applications for unserved areas will not be permitted to have 39 dBu contours which extend into an existing licensee's CGSA for the relevant frequency block or which extend into an MSA or RSA in which the exclusive five-year fill-in period has not yet expired. *See* Sections 22.903 (a) and (a)(1) and 22.923 (c)(1) (which prohibit extensions outside the boundaries of MSAs or RSAs). However, a *de minimis* 39 dBu contour extension into an MSA or RSA in which the five-year fill-in period has not expired may be requested if supported by a waiver request, provided that an engineering justification is submitted indicating that the system is designed only to serve areas within the boundaries of the applicant's CGSA, and that the extension is unavoidable because of irregular terrain or an unusual MSA or RSA boundary. An alternative engineering showing with no 39 dBu contour extension must be provided at the same time, so that we can process the application in case the waiver is denied. Failure to comply with this requirement and the requirements of Section 22.19 will cause the application to be returned as defective. *See* Proposed Rule 22.903(f). In addition, the applicant for an unserved area may supplement its waiver request with a letter from the MSA or RSA licensee whose five year fill-in period has not expired stating that the licensee has no objection to the extension.

30. Although waivers may be granted to extend a 39 dBu contour into an MSA or RSA in which the five-year fill-in period has not expired, we do not propose to afford waiver applicants any right to interference protection against the existing MSA or RSA licensee. However, after the five year fill-in period runs, any unserved area licensee whose 39 dBu contour includes such *de minimis* coverage of the extension area will have interference protection in that area which will automatically become part of the unserved area licensee's CGSA. If the MSA or RSA licensee has not tried to serve this area by this time we should not impose barriers against someone providing service in the area. Moreover, the waiver applicant should be protected since it has been providing service in the area. Additionally, before the five year fill-in period expires, if the frequencies chosen for a 39 dBu contour *de minimis* extension, or any other technical problem, causes interference to an existing MSA or RSA licensee, the licensee granted the waiver would have to change frequencies or pull back its contour to eliminate the extension causing the interference. *See* para. 52, *infra* and Proposed Rule 22.903(f).

31. We do not intend through this Rule Making to preclude an existing RSA licensee from entering into a contract which would permit an unserved area licensee to maintain a 39 dBu contour covering both an unserved area and an area in an RSA where the five-year fill-in period has not yet run. Our present rules permit an RSA licensee, within the five-year fill-in period, to file an application to serve other CGSAs within the RSA, free from the filing of competing applications. The RSA licensee may then transfer this new CGSA area to another party. *See* Section 22.31(f) of the rules. Using this approach an unserved area licensee could operate a combined area including both the unserved area and the RSA area. This approach can improve the ability of an applicant to create a viable service area while still protecting the existing RSA licensee's exclusive fill-in rights.[23] This proposal would apply during the five year fill-in period regardless of whether we maintain geographical boundaries or not.

32. Notwithstanding the foregoing, we also seek comment on an alternative proposal that would permit an RSA licensee/grantee to allow others to file inside the RSA during the five-year fill-in period. This approach would eliminate the Section 22.31(f) two step process for transfering a portion of an RSA and fill-in rights to a third party. We would instead require the third party to obtain a signed statement from the existing RSA licensee/grantee waiving its right to object to the specific service proposal or any expansions thereof, on the basis of its fill-in rights. In *Rules for Rural Cellular Service* (*Fifth Report and Order*), 3 FCC Rcd at 6402, we stated that when an RSA licensee/grantee transfers its entire RSA authorization, consisting of one or more CGSAs, to another party, the fill-in period and the exclusive right of expansion without competing applications transfers with the authorization. If the RSA licensee/grantee transfers less than its total authorization to another party, that transferee does not obtain the exclusive right to expand to areas within the RSA not covered by the transferred authorization unless the transferee obtains a signed statement from the licensee/grantee transferring such rights. *See* Section 22.31(f). We tentatively conclude that our proposal to permit the RSA licensee/grantee to allow other applicants to file inside the RSA during the five-year fill-in period would promote the expeditious provision of service to unserved areas, especially if the incumbent RSA licensee is not interested in or capable of providing service to these areas. We seek comment on this tentative conclusion and on additional rules which would need to be adopted to implement this proposal.

4. SERVICE CONTOURS AND CGSA MAPS

33. Our experience with cellular systems has persuaded us that we need more reliable records on existing systems. Since we are now going to accept applications for unserved areas, we must have updated information about the 39 dBu contours and CGSAs of existing systems. This information is not always readily available because licensees make permissive changes to their systems and need not file new maps with the Commission showing the entire system. As a result, we propose to require that every existing cellular licensee file with the Commission 180 days prior to the time the 5 year fill-in period expires an updated map of its contours and CGSA (on a scale of 1:250,000) and a frequency utilization chart or frequency plan.[24] We also seek comment on filing intervals, *i.e.*, should the maps be required every year or every two years, or should filing be required when changes are made to cell sites. *See* Proposed Rule 22.925.

C. APPLICATION PROCESS

1. WHO MAY APPLY

34. In the past, existing cellular licensees have argued that they should be given preference, through the comparative hearing process, in the granting of licenses for unserved areas. They argue that they can most efficiently extend an existing system into an adjacent area because they can operate with greater economic efficiency than could a smaller company operating in an economically marginal area. Existing licensees also argue that speculators will apply for adjacent areas simply to obtain payment from the adjacent system licensee. In addition, they maintain that it is not in the public interest to grant licenses to persons who do not intend to build and operate a cellular system.

35. On the other hand, applicants for MSAs and RSAs who have received authorizations to construct and operate cellular systems have five years after the date of these authorizations to expand or modify their systems free from competing applications. In both the *Second Report and Order*, 2 FCC Rcd at 2308, and the *Fifth Report and Order*, 3 FCC Rcd at 6401, we determined that five years provide sufficient time for licensees to expand their systems, to resolve unforeseen problems in providing service, and to meet changing demand. We continue to believe that this period provides ample time for licensees fully to establish their systems. Moreover, our open entry policy strongly favors permitting new entrants to apply for licenses. *Cellular Lottery, recon.*, 101 FCC 2d at 586. Therefore, we propose that after the five year fill-in period has expired in either an MSA or RSA, applications for remaining unserved areas should be treated as applications for an initial license. Under this approach, existing licensees would not be provided any preference over new applicants.

2. LOTTERIES

36. Section 309(i) of the Communications Act provides the Commission with discretionary authority to grant licenses or permits through the use of a system of random selection when there is more than one application filed for an initial license.[25] It is clear from the legislative history of this section that Congress intended the Commission to have the power to institute lottery proceedings in order to prevent excessive delays and costs in the licensing process.[26] We believe that, absent the use of lottery procedures for selecting applications for unserved areas, there will be excessive delays. Our experience with the processing of applications for MSAs and RSAs has demonstrated that lotteries accomplish our goal of expediting service to the public more quickly than comparative hearings. Moreover, most applicants' proposals are similar. Their differences, if any, are of degree and not kind, and the comparative hearing process is ill-suited for comparing cellular system designs. *See, e.g., Cellular Lottery Order*, 98 F.C.C. 2d at 186. Balancing all of the foregoing concerns, we tentatively conclude that applications for unserved areas should be selected by lottery. We believe this remains the best way to achieve orderly processing and expeditious licensing. *See* Proposed Rule 1.823 (b)(3). *See also* Proposed Rules 22.916 (c) and 22.33 (a). Finally, in order to ameliorate some of the concerns of existing licensees, we are proposing additional rules to ensure that applicants are sincere. *See* Sections D, E and F *infra*. We request comment on this proposal and request that parties identify the advantages and disadvantages of any other method which could be employed to select among competing applicants, including, but not limited to, abbreviated hearing procedures, either before an Administrative Law Judge or a paper hearing. *See, e.g.*, Section 22.35 of the Rules.

3. ADDITIONAL LOTTERY PROCEDURES

37. We also propose that the Commission review the qualifications of each lottery winner. On further reconsideration of our *Cellular Lottery Order*, we stated that requiring each applicant to certify that its application meets with all applicable Commission rules is a proper means of addressing the Congressional objective of ensuring that only those applications that are deemed acceptable for filing by the Commission be included in the lottery. 59 Rad. Reg. 2d (P&F) at 409. We further stated that an application containing this certification will be accepted for filing without further review and included in the lottery. *Id.* at 409. In addition, we stated that the tentative selectee's application will be carefully reviewed to ensure its compliance with the cellular application standards and will be dismissed for failure to do so. *Id.* at 410. In the instant proceeding, we propose to use the same procedures to evaluate applications for unserved areas, by reviewing the qualifications of the winner only after the lottery. If the lottery winner is qualified, the Commission will grant its application and the losing applications will be dismissed.[27] In the event that the selected application cannot be granted, it will be dismissed, or designated for hearing pursuant to the provisions of Section 1.822 of the rules. Because there will be no rankings of applications in the lottery, if the selectee's application is dismissed, another lottery will be held to select an application from the remaining applications. *See* Proposed Rule 1.823(b)(3). *See also* Proposed Rules 22.916 (c) and 22.33 (a).

D. APPLICATION CONTENT

38. Generally, we believe that applications to provide cellular service in unserved areas should be filed in the same form required for RSAs. The RSA rules are the result of refinements we have made to the cellular application rules over the past several years. These rules reflect our goal of ensuring that service is provided to the public in the most expeditious manner. These rules also reflect the large number of applications the Commission has received for even the smaller RSA markets. Because we continue to be concerned about potential abuses in our applications process, the rules adopted for unserved areas should promote the filing of applications only by persons sincerely interested in building and operating cellular systems. We believe this requires adherence to our stricter RSA cellular standards. Specifically, we propose to dismiss cellular applications which do not comply with our "letter perfect" standard and which do not comport with minimal standards of acceptability.[28] In addition, we are proposing a new rule that specifies exhibits which must be included in the application, including the order in which they must be attached. *See* Proposed Rule 22.924.

39. Pursuant to current Section 22.902(b), applicants for unserved areas may apply for either frequency block once the five year fill-in period has expired for that block, and the applicant must specify the desired block in its application. Applicants for unserved areas will not be

allowed to have an interest in more than one pending application covering overlapping CGSAs,[29] even if the applications request different frequency blocks. *See* Proposed Rule 22.902(b)(3) and paras. 48-49, *infra*.

1. FILING LOCATION

40. As stated previously, we are uncertain at this time of the number of applications we will receive for unserved areas. Given the number of applications for unserved areas which have been filed prematurely, the number could be large. We are therefore proposing that all initial cellular applications for unserved areas, including responsive mutually exclusive applications, be filed at the Strip Commerce Center Facility in Pittsburgh.[30] If in the future it becomes apparent that the number of applications is relatively low, we may accept applications in Washington, D.C. This change in filing location would be announced by subsequent rule change.[31] *See* Proposed Rule 22.924.

2. MICROFICHE

41. Recently, we adopted new rules which require that noncellular applications and non-initial cellular applications be filed on microfiche. *See Revision of Filing Procedures*, 3 FCC Rcd 6684 (1988), *recon.*, 4 FCC Rcd 5654 (1989). *See, e.g.*, Section 22.6 (d) of the rules. We tentatively conclude that the reasons for adopting the microfiche filing requirements apply to applications for unserved areas. Therefore, we propose to amend Section 22.6 to incorporate cellular applications for unserved areas in the microfiche filing requirements. *See also* Proposed Rule 22.924 for specific filing requirements.

3. ORIGINAL APPLICATION

42. In the RSAs we required that only an original and one copy of the microfiche would be filed initially. Once a lottery winner was announced, the rules required the winner to file the original and two paper copies within seven days. With applications for unserved areas, however, the map on a scale of 1:250,000 will be important in making the determination of mutual exclusivity. Therefore, we propose that an original and one paper copy of applications for unserved areas be filed together with three microfiche copies. *See* Proposed Rule 22.924(c).

4. TRANSMITTAL SHEET

43. As with applications filed for RSAs, we also propose that a transmittal sheet be filed with applications for unserved areas. The transmittal sheet is a convenient form used by initial processing personnel in Pittsburgh to process filing fees and enter appropriate information in our data base. As with our current rules, the information on the transmittal sheet must match exactly the information on the jacket of the microfiche and on the cover of the application. In addition, all items in the transmittal sheet must be completed.

44. One of the differences on the transmittal sheet from current practice is the designation of market number and name. If we adopt the proposal to eliminate geographical boundaries, the market numbers used previously will no longer be useful in defining cellular system territories; however, they will still help to determine the location of a system for the purpose of determining mutual exclusivity.[32] Therefore, we propose that on the transmittal sheet, applicants continue to list the market number or numbers and the market name or names in which the proposed unserved area is located. Correspondingly, the jacket of the microfiche should also identify all affected market numbers and names. This rule would apply to the cover of the application as well. Failure to comply with any of these requirements will cause dismissal of the application under the "letter perfect" standard. A new transmittal sheet will be available for applications for unserved areas, and applicants will be required to use the new transmittal sheet for their filings. Applications filed with the incorrect or previous transmittal sheet will not be accepted for filing.

5. CERTIFICATION

45. Each application will be required to have the transmittal sheet referred to above as a cover sheet for the application. This transmittal sheet will contain a certification. The transmittal sheet will constitute the cover sheet of the paper copy and of the microfiche application, although for the paper copy it will be preceded by a stiff cover. *See* Proposed Rule 22.924 (c)(1). The Form 401 (which is to begin with a table of contents, *see* Proposed Rule 22.924 (b)), will immediately follow the transmittal sheet. All applicants must certify, under penalty of perjury, that the application is complete in every respect and contains all the information required by FCC Form 401 and the Commission's cellular rules. The applicant must also certify that it is the real party in interest in the application and that there are no agreements or understandings, other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest in the application. The applicant must also certify that it intends to construct and operate the station as proposed and that there are no agreements or understandings in existence that are inconsistent with that intent. The certification must be dated and signed in accordance with Section 1.743 of the rules. In addition, the title of the person signing the certification must be indicated. *See* Proposed Rule 22.924(c)(2).

6. MAP

46. The map required to be filed with the application as Exhibit 1 must be on a scale of 1:250,000. It must have a legend, scale, latitude and longitude. The map must be clear, legible and have the cell sites specifically plotted. This map must depict, with clear labelling, the entire CGSA, the 39 dBu contours, and that portion of the RSA or MSA boundaries visible on the map. *See* Proposed Rule 22.924(b)(1)(i). It is essential that our map requirements be complied with strictly. The staff must be able to plot locations and measure distances on the map. Consistent with our previous policy with other cellular applications, we propose that if the map does not comply with the requirements of our rules the application will be returned as defective pursuant to Section 22.20 of the rules. *See Rem Communications*, 3 FCC Rcd 3705 (1988).[33]

7. FINANCIAL SHOWINGS

47. We tentatively conclude that the firm financial commitment requirements in our rules should be retained for applications for unserved areas in order to help guarantee that only *bona fide* applicants file applications. Therefore, all applicants will be required to demonstrate the financial commitment described in Section 22.917 (c) of the

rules. *See* Proposed Rule 22.917(f). In *Rules for Rural Cellular Service (Fourth Report and Order)*, 4 FCC Rcd 2542 (1988), we required a firm financial commitment of all nonwireline RSA applicants at the time they file their individual applications for each cellular market. This was done to prevent the filing of speculative applications. However, the Commission found no evidence of abuse of the licensing process by wireline carriers. Thus, wireline carriers could submit their financial qualifications showing within 30 days of the public notice announcing their status as tentative selectee. For unserved areas, all applicants will be similarly situated since there will be no frequency set-aside. Therefore, in order to promote our objective of preventing speculative applications, we propose to require all applicants to submit a firm financial commitment with their applications.

8. OWNERSHIP OF APPLICATIONS

48. We also propose ownership rules similar to those for RSA applications in evaluating applications for unserved areas. Therefore, we propose that in the filing of applications for unserved areas, no party shall have an ownership interest, direct or indirect, including interests of less than one percent, in more than one mutually exclusive application.[34] *See, e.g., Rules for Rural Cellular Service (Third Report and Order)*, 4 FCC Rcd 2440 (1988). An exception will continue to be made for publicly traded corporations (interests of less than five percent not counted) and passive investors (interests of less than 10 per cent not counted). *See* Rule 22.921. In other words, we will continue to prohibit an applicant from having an interest in numerous mutually exclusive applications, with the intent of bettering its odds in the lottery. In addition, we propose that, with the exceptions noted above, no entity may have an interest in more than one pending application for an overlapping CGSA even if the applications request different frequency blocks. This will also help prevent artificial bettering of an entity's chances in the lottery. Such a rule in unserved areas would help promote fairness in the cellular lottery process. *See Cellular Lottery Order*, 98 F.C.C. 2d 175 (1984). *See also* Proposed Rule 22.921 (d). We seek comment on these proposals and any other proposals which may promote fairness in the cellular lottery process.

49. We propose to exclude from the ownership limitation mutually exclusive applications filed by existing licensees or permittees who own systems which are abutting the unserved area. Thus, our proposal would allow unlimited ownership interests, direct or indirect, in more than one mutually exclusive application, if the applicants are currently authorized in systems which abut the unserved area. The proposal would permit applicants to have a common owner or percentage ownership participation by a licensee of the abutting system. As an example, company A owns a percentage participation in both B and C. B files for an unserved area which abuts B's system and C files an application for an unserved area which abuts C's system and the applications are mutually exclusive. Under our proposal both B's and C's applications would be accepted for filing even though the applications are mutually exclusive and have common ownership interests. Neither A, B nor C could also have an interest (with the exceptions noted above) in applications pending at the same time for more than one frequency block in the same geographic area. We believe that this exemption is consistent with our interest in promoting fairness in the cellular lottery process. Our experience tends to demonstrate, and we have no evidence to indicate otherwise, that existing licensees would not try to skew the lottery process in connection with abutting areas. We seek comment on this proposal and any other proposals which may promote our interest in increasing fairness in the cellular lottery process.

50. We propose to amend the real party in interest rule, Section 22.13(a) to require the disclosure of all parties to a partnership agreement. Recently, the Common Carrier Bureau issued a declaratory ruling stating that partnerships which apply for cellular authorizations must reveal all of their constituent partners. *See Common Carrier Bureau Issues Declaratory Ruling Concerning Disclosure of Partnership Interests By Cellular RSA Applicants*, Public Notice No. 366 (released November 3, 1988). In this ruling the Bureau stated that the clear intent of Section 22.13 (a)(1) of the rules, read in conjunction with the cellular ownership rules, requires the identification of all partners to a partnership agreement. We therefore propose to amend Section 22.13(a) to make this policy explicit. The proposed rule requires applicants to disclose the name of each partner (including partners with a less than 1% interest in the applicant) and submit a signed and dated copy of the partnership agreement. The partnership information must include each partner's citizenship. We need this information in order make our public interest determinations on the qualifications of an applicant and to enforce Section 310 (b) of the Communications Act.

9. FAA NOTIFICATION

51. We recently adopted rules which allow construction to commence prior to receiving an authorization. *See Rules to Allow Public Mobile Service Applicants to Commence Construction Prior to Authorization*, 4 FCC Rcd 5960, 5962 (1989). *See also Obtaining Antenna Marking and Lighting Specifications*, Public Notice No. 4265 (Com. Car. Bur. released August 30, 1989). Current rules require that RSA applicants file with the FAA when they are designated tentative selectee. *See* Rule 22.923 (b)(3). In order to expedite this procedure, we propose to require applicants for unserved areas to notify the FAA of their proposed construction, if necessary, at the time they are announced by public notice as lottery winners. In the event an applicant does not have mutually exclusive applications filed against its application, FAA notification should be filed 45 days after the application has appeared on Public Notice. *See* Proposed Rule 22.924. This procedure will ensure that unnecessary numbers of applications need not be filed with the FAA.[35] We ask that interested parties comment on our proposal and identify the advantages and disadvantages of each aspect of the proposal.

10. COORDINATION

52. Section 22.902(d) establishes parameters for frequency coordination among cellular applicants and existing cellular licensees. We propose to add to our rules a new Section 22.903(f)(1)(i) with requirements for frequency coordination in cases of 39 dBu contour extensions from unserved area systems into MSAs or RSAs in which the five-year fill-in period has not yet expired. All authorizations allowing 39dBu contour extensions have been issued with the condition discussed below (and set forth in para. 69, *infra)* which we now propose to incorporate (with minor modifications) into the rules. We be-

lieve this is necessary in order to avoid disputes in the future and to put applicants on notice as to what to expect if they have 39 dBu contour extensions. Consistent with our established policies, in the case of disputes over 39 dBu contour interference from unserved area systems to existing or future MSA or RSA systems, during the fill-in period for the markets into which a contour extends, the licensee with the contour extension will have to change frequencies in the cells causing the interference or pull back the 39 dBu contour to eliminate the interference. We do not propose to afford waiver applicants in unserved areas any right to interference protection against an MSA or RSA licensee whose fill-in rights have not expired. After the five year fill-in period and unless the MSA or RSA licensee has filed an application to serve the extension area, an unserved area licensee whose 39 dBu contour covers the extension area will have interference protection in this area, which will automatically become part of the licensee's CGSA.

53. In accordance with current policies, existing coordination procedures with Mexico and Canada will be followed for unserved area systems. Systems close to either of these two borders have to coordinate with systems in the two countries in accordance with established procedures or treaties.

E. PROCESSING OF APPLICATIONS

1. PUBLIC NOTICE PERIOD

54. Applications which are acceptable for filing will be placed on public notice.[36] In accordance with Section 309 (b) of the Communications Act, the Commission will not grant any application until expiration of a period of 30 days following the issuance of public notice listing the application as accepted for filing. *See* Rule 22.27 (b)(1).

2. AMENDMENTS

55. For applications for unserved areas we propose to follow the same processing procedures used for MSA and RSA applications. We tentatively conclude that the reasons for adopting the "no major amendment" rule for initial cellular filings, to accelerate application processing and avoid continuous changes to applications, apply to applications for unserved areas. *See Cellular Lottery Order*, 98 F.C.C. 2d 175 (1984). Thus, we propose that applicants for unserved areas may not file amendments prior to the lottery, except for minor amendments in the limited circumstances detailed below (relating to contour reduction) and amendments under Section 22.23(g)(2), which resolve frequency conflicts. The lottery winner may file minor amendments, including information required by Section 1.65, but no major amendments, except for those listed in Section 22.23(g), excluding those listed in Section 22.23(g)(2).

56. Section 22.23(g) provides for exemptions from the cut-off rules and, by its terms, is applicable to cellular applicants. Section 22.23(g)(2) provides an exemption from the cut-off rules where an applicant amends its application to eliminate a frequency conflict, as long as no new frequency conflicts are created. The (g)(2) exemption permits the amending applicant to retain its original filing date. The purpose of the rule is to expedite processing by permitting amendments to resolve frequency conflicts, thereby terminating further proceedings. However, as a practical matter, Section 22.23(g)(2) has not been available to cellular applicants because of a combination of our other rules such as our filing windows, the exclusive five-year fill-in periods and the wireline frequency set-aside. With the elimination of frequency set-aside and our proposal in this Rule Making to rely on traditional notice and cut-off procedures, the (g)(2) exemption will become available to cellular applicants. We therefore request comment on whether it is in the public interest to permit the (g)(2) exemption for applications for unserved areas. If we were to permit such (g)(2) exemptions there would appear to be public interest reasons to define more precisely the exemption's applicability. For instance, amendments should only be made in the same geographic area as the original application. This is consistent with current staff practice in the PLMS service but is not explicitly set forth in the rules. We request comment as to whether a specific geographic limitation should be added to the rule, and what that limit should be. In addition, we request comment on whether we should preclude use of the exemption when an applicant has applied for one of the frequency blocks but then amends to the other frequency block after the five-year fill-in period expires for the new block. To permit the applicant to amend its application in this manner would be unfair to other applicants which may want to apply for the new frequency block. These probable new applicants would be precluded from filing if the Section (g)(2) exemption applied to the amendment, since the amending party could retain its original filing date and cut off mutually exclusive applications for the new frequency block. We request comment on these proposals to limit the application of the Section 22.23(g)(2) exemption for applications for unserved areas. Additionally, we seek comment on any further limitations which should be imposed on the Section 22.23(g)(2) exemption, in order to clarify the applicability of this exemption in the cellular service.

57. Furthermore, we propose that minor amendments which resolve the mutual exclusivity of one or more applications may be filed before the lottery. This will allow applicants to amend their proposals to pull back their contours in order to eliminate the mutual exclusivity without creating new mutually exclusive situations. Through these proposals we seek to expedite service to the public by eliminating the need to use random selection procedures. *See* proposed revisions to Section 22.918.

3. SETTLEMENTS

58. In accordance with our policy of encouraging settlements, we tentatively conclude it would be in the public interest to allow full settlement agreements between mutually exclusive applicants. Therefore, we propose that settlement agreements involving all mutually exclusive applications may be filed no later than two business days prior to the lottery date for these applications. *See* Proposed Rule 22.33(b)(3).

59. In the top 120 cellular markets, a joint enterprise resulting from a partial settlement among mutually exclusive applicants, if entered into after the filing of individual applications by its members, received the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached. *See* Section 22.33 (b)(1). Thereafter, in markets beyond the top-120 and in the RSAs, cumulative chances were awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. *See* Section 22.33 (b)(2). We recently stated that

nonwireline partial settlements have slowed the processing of applications and delayed the initiation of service to the public. We also stated that we hoped to dissuade speculators from filing by prohibiting partial settlements among nonwireline applicants for RSAs. *See Rules for Rural Cellular Service (Third Report and Order)*, 4 FCC Rcd 2440 (1988). Tentatively, we conclude that it would not be in the public interest to allow partial settlements (or the merger of interests between two or more mutually exclusive parties where there are other mutually exclusive parties as well) among mutually exclusive applicants for unserved areas, regardless of the frequency block applied for. Allowing partial settlements would slow application processing and delay initiation of service to the public with no overriding public interest benefits. Since we are eliminating the wireline set aside, and therefore anticipate no difference in the relative number of applications for each frequency block, this concern applies across the board. Because there would be no partial settlements for unserved areas, there would be no cumulative chances. We request comment on these proposals. *See* Proposed Rule 22.33(b)(3).

4. OPPOSITION TO APPLICATIONS

60. We believe the petition to deny cycle established for RSA applications may delay the processing of applications for unserved areas. Therefore, we do not propose to follow the same approach. Instead, in order to expedite application processing for unserved areas we propose to follow the petition to deny procedures used for Public Land Mobile applications. Thus, we would require that petitions to deny be filed within 30 days after the date of public notice announcing the acceptance for filing of applications for unserved areas. *See* Section 22.30. These petitions would not be reviewed prior to conducting the random selection process. Petitions to deny filed against the lottery winner would be reviewed after the winner is announced. *See* Proposed Rule 1.823 (b)(3). We request comment on this proposal or other alternatives which would expedite application processing.

F. POST - GRANT RULES

1. CONSIDERATIONS INVOLVING TRANSFER OR ASSIGNMENT APPLICATIONS

61. We seek comment on whether to allow a licensee to sell an authorization for unserved areas by transfer, assignment or any other form of alienation, when the facilities have not been constructed. *See* Proposed Rule 22.920(c). In *Bill Welch*, 3 FCC Rcd 6502 (1988), we permitted such sales in order to provide flexibility to licensees to transfer their authorizations when it is not economical to build the system as originally proposed. We were concerned that an applicant, realizing that its original proposal was no longer viable, would be forced to build a system that could not provide quality service to the public. We therefore concluded that free transferability of authorizations for unbuilt systems would be in the public interest in the cellular service to ensure that efficient, economically viable systems would be built. However, once nationwide licensing of all markets is complete and five-year fill-in periods have expired, the economic viability of the remaining unserved area is, at best, speculative from the outset. Therefore, it appears that the original rationale for permitting the sale of a bare construction permit is not applicable to unserved areas. In addition, we recognize that in other services the sale of a bare construction permit is generally not permitted. Moreover, since these are the last areas in the country to be licensed, and may not be economically viable as stand alone systems, there is a higher probability that applications will be filed for the mere sake of speculation or delaying the expansion of an already authorized system. An existing licensee with a desire to expand its system could be forced to pay a large amount of money to speculators for unserved area authorizations. For this reason, we believe that a review of the qualifications of the tentative selectee and an evaluation of assignment and transfer requests pursuant to the "anti-trafficking" provisions of Section 22.40(b) will not be sufficient to prevent speculation on authorizations for unbuilt facilities for unserved areas. We tentatively conclude that the benefits to the public of preventing the free transferability of unbuilt facilities for unserved areas outweigh the benefits of allowing the free transfer of such facilities.[37]

2. CONSTRUCTION PERIOD

62. In the interest of providing service to the public in the most expeditious manner possible and in order to deter speculative applications, we propose to require that permittees for unserved areas complete construction and provide service to the public within one year from the authorization grant. With new construction techniques and with smaller systems, it would appear that permittees no longer require a full 18 months to complete construction. *See* Proposed Rule 22.43 (c)(2)(i). We also seek comment on a proposal to require licensees to have all equipment on order and state certification proceedings initiated (if required) within 3 months from the date of authorization. *See* Proposed Rule 22.43 (c)(4). In addition, we propose to enforce these requirements through automatic cancellation of the authorization for failure to comply with this rule. That is, the authorization will be conditioned on compliance with these requirements. We also seek suggestions on any other requirements which may be imposed to ensure that applicants or lottery winners really intend to build and operate their systems.

IV. RULES APPLICABLE TO ALL CELLULAR LICENSEES [38]

A. PETITIONS TO DEFER

63. When we established the wireline frequency set aside and filing requirements, there was a possibility that wireline carriers would have an unfair headstart over nonwireline carriers in the introduction of service to the public. Therefore, the Commission adopted a rule which permitted a nonwireline carrier to file a petition to defer initiation of service by the wireline carrier for a brief period of time not to exceed 6 months. *See Cellular Systems*, 89 FCC 2d at 74-75 & n. 32. *See also Rules for Rural Cellular Service (Third Report and Order)*, 4 FCC Rcd 2440 (1988). This policy was adopted to ameliorate any possible anticompetitive effects that could result from early wireline entry.

64. We have stated that a nonwireline selectee bears a heavy burden of showing that early entry by the wireline would not be in the public interest. *Cellular Systems*, 89 FCC 2d at 74-75. We emphasized that we would impose a brief moratorium on service by the wireline only where it could be demonstrated in particular factual circumstances that harm to the public would result from allowing the

wireline carrier an early entry into the market involved. *Id.* To date, no nonwireline applicant has been able to demonstrate that it was in the public interest to grant a moratorium on wireline service. *See, e. g., Chicago SMSA Limited Partnership*, 54 Rad. Reg. 2d 1060 (1983); *Century Cellunet*, DA 89-368 (Mob. Ser. Div. April 11, 1989); *New York SMSA Limited Partnership*, CC Docket No. 83-101, FCC 85-206 (released April 30, 1985); *Miami CGSA, Inc.*, Mimeo No. 4507 (Com. Car. Bur. May 31, 1984).

65. Given our experience to date, it is not at all clear that early entry into a cellular market provides a wireline carrier with an anticompetitive advantage over a nonwireline carrier. We know of no circumstance where late entry by a nonwireline carrier has hampered its ability to compete. Much of any theoretical headstart advantage has been eliminated by the ability of the nonwireline carrier to resell the wireline carrier's services. In addition, the mere filing of a petition to defer serves to delay the provision of service to the public, which in itself is an undesirable result.

66. Based on the foregoing, we tentatively conclude that this "headstart" policy should be eliminated. Therefore, we propose not to allow the filing of petitions to defer in MSAs, RSAs,[39] or in unserved areas.[40] We emphasize that under special circumstances we would entertain requests for relief to try to resolve any headstart problems. We ask for comments concerning this proposal.

B. OWNERSHIP OF CELLULAR SYSTEMS

67. Inherent in the concept of a wireline set-aside was the concept that the licensee on one frequency block in a market would not own an interest in the other frequency block licensee in the same market. For instance, in *Cellular Systems*, 86 F.C.C. 2d at 491-92, the Commission stated: "Thus, with two licensees per market, it will be more difficult for a single entity to dominate the cellular market nationwide." On reconsideration, the Commission stated that the separate frequency allocation "increases rather than decreases the competitive nature of the cellular industry. In addition, this plan furthers the agency's longstanding and judicially validated policy favoring separate allocations for wireline and nonwireline mobile systems in order to foster the development of competing systems, techniques and equipment." *Cellular Systems*, 89 F.C.C. 2d at 69-77.

68. Because of these competitive concerns we are now proposing to adopt a rule for all markets to require that no person may have any direct or indirect ownership interest in licensees for both frequency blocks in overlapping CGSAs unless such interests pose no substantial threat to competition. *See* Proposed Rule 22.902(b)(4). We tentatively conclude that ownership situations involving controlling interests would presumably always raise competitive concerns and should, therefore, be prohibited. We accordingly propose to require that a licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for one frequency block in a CGSA may not own any interest in the licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for the other frequency block in an overlapping CGSA.

69. We also request comment whether, in situations involving less than a controlling interest, there exists a rational percentage ownership standard which could be adopted to define when no substantial threat to competition would be presumed to exist. For example, we could adopt a rule that a direct or indirect ownership interest of 5 percent or less in both competing systems is automatically excluded from the general rule prohibiting multiple ownership interests. A less than five percent owner in either system is unlikely to have the ability to affect competition in a given market.[41] We might also provide that an ownership interest in either or both systems of a greater than five percent share but less than a controlling interest would have to be analyzed on a case by case basis, based on the antitrust principles such as those contained in Section 7 of the Clayton Act, 15 U.S.C. § 18. Although certainty is important, standards for evaluating the competitive effects of minority ownership interests of greater than five percent are not easily formulated because the competitive impact of such interests depends upon a variety of factors, *e.g.*, the percentage size of both interests, whether the ownership interest is a limited partnership interest, whether a corporation is closely held or publicly traded. We seek comment on these proposals and any other proposals which would meet our pro-competition objectives.

C. DE MINIMIS 39 dBu CONTOUR EXTENSIONS

70. Cellular authorizations granted with 39 dBu contour extensions outside the MSA or RSA have been conditioned as follows:

> This authorization does not include the right to any interference protection in any areas outside the MSA/RSA and is also conditioned upon coordinating with the current or future co-channel licensee(s) in the areas outside the MSA/RSA. The licensee is herein put on notice that in the event the current or future MSA/RSA licensee encounters interference from the extension(s), the licensee herein will have to change frequencies in those cell(s) or pull back their 39 dBu contour to eliminate the interference due to the extension.

We now propose to adopt a rule incorporating this condition, with minor modifications. We believe this is necessary in order to avoid disputes in the future. We are proposing an identical rule for unserved areas. *See supra* para. 52 and Proposed Rule 22.903(f)(1)(i). In accordance with our policies, in the case of disputes over 39 dBu contour interference to MSA/RSA licensees that occur during the fill-in period in the market into which a contour extends, the licensee with the 39 dBu contour extension will have to change frequencies in those cells or pull back its 39 dBu contour to eliminate the interference due to the extension. *See* Proposed Rule 22.902 (d)(4). As in our proposal for unserved areas, 39 dBu contour extensions into areas where the five year expansion period has not expired will not be protected from interference. However, after the five year expansion period expires, any licensee whose 39 dBu contour covers an extension area will have interference protection in the extension area, and this area will automatically become part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period. *See* Proposed Rule 22.902 (d)(4). As we stated for unserved areas, if the MSA or RSA licensee has not tried to serve the extension area covered by the other carrier we should not impose barriers against someone providing service in the area. The licensee with the 39 dBu contour extension should be

protected since it has been providing service in the area. By this proposal we are not adding new requirements for existing licensees, nor changing the terms of their authorizations to their detriment, since authorizations have been granted with the more restrictive condition set forth above. Licensees with authorizations not specifically conditioned, if there are any, have been on notice of the policy that the extensions were not protected from interference. *See Cellular Systems*, 89 FCC 2d at 87. *See also* Public Notice, *Cellular Application Filing Procedures - An Update*, Mimeo No. 567 (Mob. Ser. Div. November 1, 1982).

D. FINANCIAL SHOWINGS

71. We are also proposing to amend Section 22.917(a)(1) and (b)(2) to eliminate the requirement that financial showings be filed in support of modified facilities in any MSA or RSA market. Existing licensees have already submitted financial showings to this Commission for their operating systems. In addition, our experience in processing applications for modified facilities demonstrates that the financial qualifications for applicants is largely not an issue. We also believe this requirement to be needlessly burdensome to applicants. Therefore, we do not propose to request additional financial showings from applicants who are merely modifying existing facilities.

E. OTHER CHANGES

72. We are also clarifying and adding some definitions to the rules. For instance, we are adding definitions for "fill-in applications", "fill-in period", "initial cellular applications", "Metropolitan Statistical Areas", "non-initial celluar applications" and "unserved areas". We are clarifying the definition for Rural Service Areas. In addition, we are also clarifying Section 22.43 to eliminate the previous language "ready for operation" and inserting in its place "must provide service to the public". This will clarify that service must actually begin by the end of the construction period. Finally, we are also proposing to revise Section 22.921(a) and (b) to eliminate references to "non-MSA/non-NECMA areas" which should have been previously eliminated from the rules when we adopted RSAs. We request comment on all of the policies and procedures proposed in the Appendix to this Notice. We also invite interested parties to propose alternatives to those proposed here together with actual rule language to codify those alternative proposals. Finally, we also request comment on any other procedures or policies which should be adopted in order to achieve our objectives in this proceeding.

V. REGULATORY FLEXIBILITY - INITIAL ANALYSIS

73. **Reason for Action.** We are proposing to adopt rules for the processing of applications for unserved areas in the cellular radio service, and to amend various other rules which need further clarification or modification.

74. **Objective.** The purpose of this Rule Making is to establish procedures for application filing, processing and selection which have not heretofore been established.

75. **Legal Basis.** Authority for this notice is contained in Sections 1, 4(i), 4(j) and 303 of the Communications Act of 1934, 47 U.S.C. Sections 151, 154 (i), 154(j) and 303.

76. **Description, potential impact and number of small entities affected.** None.

77. **Federal rules which overlap, duplicate or conflict with these rules.** None.

78. **Significant alternatives minimizing impact on small entities and consistent with stated objectives.** None.

79. **Reporting, record keeping, and compliance requirements.** None.

VI. PAPERWORK REDUCTION ACT OF 1980

80. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ADMINISTRATIVE MATTERS

81. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally*, 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203.

82. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and with opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted two copies of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum in duplicate, to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must be clearly labelled "ex parte", state on its face that the Secretary has been served, and state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

83. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **April 2, 1990,** and reply comments on or before **April 17, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply com-

ments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

VIII. ORDERING CLAUSES

84. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r), that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

85. IT IS ORDERED, that the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 603(a)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED RULES

Part 1 and Part 22 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. Part 1- Practice and Procedure

1. The authority citation for Part 1 continues to read:

AUTHORITY: Sections, 4, 303, 48 Stat, 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.823 is amended by adding a new paragraph (b)(3) to read as follows:

Section 1.823 Random selection procedures for the Public Land Mobile and Domestic Public Cellular Radio Telecommunications Services.

* * * * *

(b) * * *

(b)(3) Cellular Radio Telecommunications Service-Unserved Areas. Petitions to deny must be filed within 30 days after the date of public notice announcing the acceptance for filing of applications for unserved areas but will not be reviewed prior to conducting the random selection. Petitions filed against the lottery winner and the winner's qualifications will be reviewed after the lottery. If the winner is qualified, the Commission will grant its application and dismiss the losing applications. If the winning application cannot be granted, it will be either designated for hearing pursuant to the provisions of section 1.822 or dismissed. If the winning application is dismissed or ultimately denied another lottery will be held to select an application from the remaining applications.

* * * * *

B. Part 22 - PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U. S. C. 154, 303.

2. Section 22.2 is amended by adding new definitions for Metropolitan Statistical Areas, fill-in applications, fill-in period, initial cellular applications and unserved areas and revising the definition for non-initial cellular applications and Rural Service Area to read as follows:

Section 22.2 Definitions.

* * * * *

EXCHANGE AREA. * * *

FILL-IN APPLICATION. Applications by cellular system licensees expanding their systems within Metropolitan Statistical Areas and Rural Service Areas during the five year fill-in period.

FILL-IN PERIOD. The time frame during which an existing cellular licensee can expand its system free from competing applications. This period commences from the date of the license grant (construction authorization) of each system and runs for five years.

INITIAL CELLULAR APPLICATIONS. Original applications for cellular systems resulting in the first authorizations in a geographic area.

* * * * *

METEOR BURST COMMUNICATIONS. * * *

METROPOLITAN STATISTICAL AREAS (MSA). 306 areas including New England County Metropolitan Areas for the New England States (NECMA) defined by the Office of Management and Budget, as modified by the Federal Communications Commission, for which a common carrier may apply to provide cellular service. This definition also includes the Gulf of Mexico Service Area (water areas of the Gulf of Mexico, its border defined as the coastline).

* * * * *

NECESSARY BANDWIDTH OF EMISSION. * * *

NON-INITIAL CELLULAR APPLICATIONS. Applications for modifications, transfer of control and assignment of authorizations for existing systems.

* * * * *

RURAL RADIO SERVICE. * * *

RURAL SERVICE AREA (RSA). An area not included in a Metropolitan Statistical Area for which a common carrier may have a license to provide cellular service.

* * * * *

TRANSFER OF CONTROL. * * *

UNSERVED AREAS. Any area in the United States or its territories which is outside of an existing cellular geographic service area.

* * * * *

3. Section 22.6 is amended by adding paragraph (b)(2) and removing paragraph (b)(3) and revising paragraphs (d) and (d)(2) and adding new paragraph (d)(3) to read as follows:

Section 22.6 Filing of applications, fees and number of copies.

* * * * *

(b) * * *

(b)(2) Unless otherwise provided by Commission rule or order, cellular applications for unserved areas may be filed after the expiration of a five-year fill-in period in a particular geographic market as defined in section 22.31, if no application that would be mutually exclusive was fled by the existing licensee prior to expiration of the fill-in period and is still pending.

* * * * *

(d) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms shall be submitted on microfiche with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Section 1.743. (*See* Section 22.913 for specific filing requirements for applications for MSAs; Section 22.923 for specific filing requirements for applications for rural cellular radio communications systems and Section 22.924 for specific filing requirements for cellular applications for unserved areas). Filings of five pages or less are exempt from the requirement to submit on microfiche, as well as emergency filings like letters requesting special temporary authority. Non-cellular and non-initial cellular applicants and those filing any amendments, correspondence, pleadings, and forms must simultaneously submit the original hard paper from which the microfiche was copied and it must be stamped "original". In addition to the original hard copy, those filing pleadings under Part 22 of the rules shall also submit 2 paper copies as provided in Section 1.51 of the rules.

(d) (1) * * *

(d)(2) Non-cellular Applications. All non-cellular applications must have the following information printed on the mailing envelope, the microfiche envelope and on the title area at the top of the microfiche: 1) the name of the applicant; 2) the city and state of the application: and 3) if the application refers to an existing station, the call sign of the station and the file number if known.

(d)(3) Cellular Applications. All cellular applications (including applications for unserved areas) must have the following information printed on the mailing envelope, the microfiche envelope and on the title area at the top of the microfiche:

(i) the name of the applicant

(ii) market name(s) and market number(s)

(iii) frequency block

(iv) if for an existing station, the call sign of the station and the file number, if known.

* * * * *

4. Section 22.13 is amended by adding a new paragraph (a)(1)(iv) to read as follows:

Section 22.13 General Application Requirements

* * * * *

(a) (1) * * *

(a) (1) (iv) In the case of partnerships, the name and address of each partner, his citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership. A signed and dated copy of the partnership agreement must be included in the application.

* * * * *

5. Section 22.31 is amended by revising paragraph (a)(1) and adding paragraph (b)(2)(iii) to read as follows:

Section 22.31 MUTUALLY EXCLUSIVE APPLICATIONS

(a) * * *

(a)(1) In the Domestic Public Cellular Radio Telecommunications Service, including applications for unserved areas, applications shall be considered mutually exclusive

if their proposed Cellular Geographic Service Areas (CGSAs) overlap in such a way that a grant of one would preclude the grant of one or more of the other applications, except that initial cellular applications for the same Rural Service Area (RSA) will be considered mutually exclusive regardless of whether their CGSAs overlap, provided however that:

* * * * *

(b) * * *

(b)(1) * * *

(b)(2) * * *

(b)(2)(iii) *Domestic Public Cellular Radio Telecommunications Service - Applications for Unserved Areas.* Notwithstanding paragraphs (i) and (ii), thirty days after the date of the public notice listing the first of the conflicting applications as accepted for filing.

* * * * *

6. Section 22.33 is amended by revising paragraph (a) and adding new paragraph (b)(3) to read as follows:

Section 22.33 GRANTS BY RANDOM SELECTION

(a) If a properly filed application for an initial license in the Public Land Mobile Service or in the Domestic Public Cellular Radio Telecommunications Service is mutually exclusive with another such application, the applications shall be included in the random selection process set forth in Part I, Section 1.821 *et seq.*; except however, that an applicant in the Public Land Mobile Service that qualifies under paragraph (c) of this section may request to proceed by comparative hearings as set forth therein. No preferences shall be awarded. Renewal applications shall not be included in a random selection process.

* * * * *

(b)(2) * * *

(b)(3) Unserved Areas. Partial settlements among mutually exclusive applicants for unserved areas are prohibited. Full settlements among all mutually exclusive applicants in an unserved area are permitted and must be filed no later than 2 business days prior to the lottery.

* * * * *

7. Section 22.43 is amended by adding new paragraph (c)(2)(i) and revising paragraphs (c)(1),(c)(2) and (c)(4) to read as follows:

Section 22.43 PERIOD OF CONSTRUCTION

* * * * *

(c) (1) Cellular base stations, which will provide coverage over 75% of the cellular geographic service area, as defined in Section 22.903 of these rules, shall be completed and the station must provide service to the public within 36 months from the date the radio station authorization is granted.

(c)(2) For systems beyond the top-90 markets, construction of an initial phase of the system, which may consist of one or more cells, must be completed, a notification on Form 489 that construction has been completed must be filed and service to the public must be provided, within 18 months from the date the radio station authorization is granted.

(c)(2) (i) *Unserved Areas.* Construction of the entire authorized system, which may consist of one or more cells, must be completed, a notification on Form 489 that construction has been completed must be filed and service to the public must be provided, within one year from the date the radio station authorization is granted.

* * * * *

(c) (4) Failure to begin service in a timely manner in accordance with this rule will result in the termination of the authorization; unless a station is constructed and the failure to commence service is for reasons of inability to obtain state certification in a state that permits construction before certification is obtained. The licensee is required to show proof of state law requirements. In addition, for unserved areas, all equipment must be ordered and state certification proceedings (if required) must be initiated within 3 months from the date the radio station authorization is granted. Compliance with these requirements is a condition of the authorization. Failure to comply with these provisions will cause the authorization automatically to terminate.

* * * * *

8. Section 22.902 is amended by adding new paragraphs (d)(4), (b)(3) and (b)(4) and revising paragraph (b) to read as follows:

Section 22.902 FREQUENCIES

* * * * *

(b) For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies listed for cellular systems A and B. For initial applications for MSAs and RSAs, common carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market, for initial applications for MSAs and RSAs.

* * * * *

(b)(3) In accordance with Section 22.31 (a)(1)(i) and (f), after the five year fill-in period has expired for a particular frequency block, applicants may apply for this frequency block to provide service to unserved areas regardless of whether the carrier is a wireline or nonwireline. The applicant shall indicate the frequency block it is applying for in the application. No person or entity may have an interest (other than those permitted under Section 22.921) in more than one pending application covering an overlapping CGSA, even if the applications request different frequency blocks.

(b)(4) *Ownership of Cellular Systems.* No person may have a direct or indirect ownership interest in both frequency blocks in overlapping CGSAs, unless such interests pose no substantial threat to competition.

* * * * *

(d)(4) Authorizations with *de minimis* 39 dBu contour extensions do not include the right to interference protection against the licensee of an MSA or RSA in which the five year fill-in period has not yet expired. During this period licensees must coordinate with the current or future co-channel licensee(s) in the areas outside the MSA/RSA. In the event the current or future MSA/RSA licensee encounters interference from another licensee's 39 dBu contour extension during the fill-in period, the licensee with the 39 dBu contour extension will have to change frequencies in those cells or modify its system to eliminate the 39 dBu contour extension causing the interference. After the five year fill-in period expires in an area into which a contour extends, the licensee whose 39 dBu contour covers the extension area will have interference protection in the extension area and this area will automatically become part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period, and that application is granted. Until such application is granted, if at all, the licensee with the contour extension may continue to operate in the extension area subject to this paragraph.

* * * * *

9. Section 22.903 is amended by adding new paragraphs (b)(1) and (f) to read as follows:

Section 22.903 CELLULAR SYSTEM SERVICE AREAS

* * * * *

(b) * * *

(b)(1) After the five year fill-in period expires in each MSA and RSA, all authorized systems' CGSAs must be coterminous with the 39 dBu contours, not including any contour or CGSA extensions beyond the MSA or RSA for which the system is not eligibile for interference protection pursuant to Section 22.902 (d)(4). Existing licensees whose five year fill-in period expired before the effective date of this rule and those which expire within a year of the effective date of this rule section will be grandfathered for one year after the effective date of this section, after which they must comply with this section.

* * * * *

(f) *Unserved Areas.* Except as provided in (1) below, the CGSA must be coterminous with the 39 dBu contours of the system. Applications for unserved areas will not be permitted to have 39 dBu contours which extend into an existing licensee's CGSA for the relevant frequency block or which extend into an MSA or RSA in which the exclusive five year fill-in period has not yet expired.

(1) Applicants may file a waiver request for a *de minimis* extension of 39 dBu contours into an MSA or RSA in which the five-year fill-in period has not expired with an engineering justification indicating that the system is designed only to serve the areas within the boundaries of the applicant's CGSA, and that the extension is unavoidable because of irregular terrain or an unusual MSA or RSA boundary. An alternative engineering showing without the *de minimis* extension must be filed with the waiver request. Failure to comply with these requirements and the requirements of Section 22.19 will render the application defective. The waiver request may include a letter or agreement from the MSA or RSA licensee whose five year expansion period has not expired stating that the licensee does not object to the extension.

(i) Authorizations including any such *de minimis* contour extensions do not include the right to any interference protection against the licensee of an MSA or RSA in which the five-year fill-in period has not yet expired. Before the 5 year fill-in period expires, if the frequencies chosen for a 39 dBu contour extension or any other technical problem cause interference to an existing MSA or RSA licensee, the licensee granted the waiver for a 39 dBu contour extension will have to change frequencies in those cells or modify its system to eliminate the 39 dBu contour extension causing the interference. After the 5 year fill-in period expires, any unserved area licensee whose 39 dBu contours covers an extension area will have interference protection in the extension area, and this area automatically becomes part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period, and that application is granted. Until such application is granted, if at all, the unserved area licensee may continue to operate in the extension area subject to this paragraph.

10. Section 22.916 is amended by revising paragraph (c) to read as follows:

Section 22.916 EVALUATION OF CELLULAR APPLICATIONS

* * * * *

(c) Evaluation of cellular applications. Mutually exclusive cellular applications shall be randomly selected according to the procedures set forth in Section 22.33 and 1.822 *et. seq.*

11. Section 22.917 is amended by removing paragraph (b)(2), revising paragraph (a)(1) and adding new paragraph (f) to read as follows:

Section 22.917 DEMONSTRATION OF FINANCIAL QUALIFICATIONS

(a) Top-120 markets. (1) Applications for new stations shall demonstrate the applicants' financial ability to meet the realistic and prudent:

* * * * *

(f) *Unserved Areas.* All applicants for unserved areas (regardless of whether they are wireline or nonwireline carriers) are required to comply with the requirements of paragraphs (c) (d) and (e) of this section.

12. Section 22.918 is amended by redesignating previous paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

Section 22.918 AMENDMENT OF CELLULAR APPLICATIONS

* * * * *

(c) Unserved Areas. Applicants for unserved areas may not file amendments prior to conducting the lottery, except for minor amendments expressly permitted under this paragraph and amendments under Section 22.23(g)(2) which resolve frequency conflicts. Section 22.23(g)(2) will only apply to amendments made within the same geographic area as the original application. In addition, Section 22.23(g)(2) will not apply to a change in frequency block. Amendments (*e.g.*, modifications that change 39 dBu contours) which resolve frequency conflicts may be filed before the lottery. The lottery winner may file minor amendments, including information required by Section 1.65, but no major amendments except for those listed in Section 22.23(g), excluding Section 22.23(g)(2), within 30 days of the Public Notice announcing the lottery results.

* * * * *

13. Section 22.920 is amended by adding new paragraph (c) to read as follows:

Section 22.920 CONSIDERATION INVOLVING TRANSFER OR ASSIGNMENT APPLICATIONS FOR CELLULAR AUTHORIZATIONS

* * * * *

(c) *Unserved Areas.* Authorizations for unbuilt facilities for unserved areas cannot be transferred or assigned, except for *pro forma* assignments of a common carrier authorization or for *pro forma* transfer of control of a permittee or licensee.

14. Section 22.921 is revised to read as follows:

Section 22.921 OWNERSHIP IN APPLICATIONS FOR CELLULAR SERVICE FOR MARKETS BELOW THE TOP 90

(a) Markets 91-120. No party may have an ownership interest, direct or indirect, in more than one application for the same MSA market, except that interests of less than one percent will not be considered.

(b) Markets beyond the top-120 and Rural Service Areas. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA except that interests of less than one percent will not be considered. For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

(c) Ownership interests in publicly-traded corporate applicants. Notwithstanding paragraphs (a) (b) and (d) of this section, no party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations, except that interests of less than five percent will not be considered.

(1) Application. In applying the provisions of subsection (c), ownership and other interests in cellular applicants will be attributed to their holder and deemed cognizable as set forth below.

(i) Passive Investors. Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies, and banks holding stock through their trust departments in trust accounts will be deemed to have a cognizable interest in a publicly-traded cellular applicant only if they hold 10 percent or more of the stock of the applicant. This provision applies only if an applicant in which such parties hold an interest certifies in its application that no such party has exerted or attempted to exert any influence or control over the officers of the applicant.

(ii) Multiplier. Attribution of ownership interests in a publicly-traded cellular applicant that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent, it shall not be included for purposes of this multiplication.

(d) *Unserved Areas*. No party to an application for an unserved area, except as described in paragraph (c) above, shall have an ownership interest, direct or indirect, including an interest of less than one percent, in more than one mutually exclusive application, except that existing licensees or permittees who own systems which abut the unserved area applied for may each file applications mutually exclusive with each other even though the applicants share common owners.

15. Section 22.924 is added to read as follows:

Section 22.924 CONTENT AND FORM OF APPLICATIONS FOR UNSERVED AREAS

(a) Applications for unserved areas may be filed after the five year fill-in period expires for each licensee in each MSA and RSA.

(b) Applications for unserved areas must be filed on FCC Form 401. The first page of the application after the cover, *see* §22.924(c)(1), and the transmittal sheet, *see* §22.924(c)(2), must be a table of contents listing the exhibits contained in the application. The following exhibits must be submitted with the application, numbered as follows:

(1) Exhibit I- A full sized map.

(i) This map must be on a scale of 1:250,000. The map must have a legend, scale, latitude and longitude. This map must be clear, legible and have cell sites specifically plotted. It must depict with clear labelling, the entire CGSA, the 39 dBu contours, and that portion of the RSA or MSA boundaries visibly marked on the map. Regardless of the scale used to satisfy the requirements for the reduced map in Exhibit II, the 1:250,000 scale map must always be used to satisfy the requirements of Exhibit I.

(2) Exhibit II- An 8= by 11 reduced map.

(i) For this map applicants have a choice of reducing the full sized map in Exhibit I above. If it is impractical to depict the entire MSA or RSA on the map with a scale of 1:250,000, applicants may use a map with a scale of 1:500,000 or similar scale. The entire MSA or RSA must be depicted, clearly labeled, with the boundaries visibly marked. The map must show cell sites and the entire 39 dBu contours. It must also clearly indicate the boundaries of the MSA(s) or RSA(s).

(3) Exhibit III- This exhibit must contain the engineering data and calculations used to derive the service contours. *See* Section 22.903(c).

(4) Exhibit IV - An exhibit indicating the frequency plan to be used if the application is granted.

(i) The frequency plan must include the number of frequencies at each cell site and the specific frequency(ies) or group from which the frequencies were taken and a frequency conversion table.

(5) Exhibit V- Ownership information in accordance with Section 22.13(a)(1). In addition individual applicants holding less than a 5% interest in a publicly held corporation that has filed a mutually exclusive application that has previously been placed on Public Notice must disclose the fact that the corporation and the applicant both have filed mutually exclusive applications. This disclosure must include the applicant's percentage interest held in the company.

(6) Exhibit VI- An indication of the applicant's service proposals for local subscribers and roamers, including the method for handling complaints.

(7) Exhibit VII - An Exhibit setting forth how the proposal complies with the Commission's cellular design concepts, and indicating the applicant's projected method for coordinated expansion of the system in response to changing demand.

(8) Exhibit VIII - An indication of the basis which the applicant will use to determine whether sufficient congestion exists to warrant cell-splitting.

(9) Exhibit IX - Full particulars regarding the cost of construction and other initial expenses of the proposed facilities and demonstration of how the applicant intends to finance construction and other initial expenses and operation for one year. *See* Section 22.917. Existing cellular licensees operating on-going cellular systems do not have to submit this exhibit.

(10) Exhibit X- If the applicant is providing public landline message telephone service in any portion of its proposed CGSA, it must indicate exactly how its proposed system would interconnect with the landline network. This information must be of sufficient specificity to enable a competitor to design its system to connect with the landline system in exactly the same manner if the competitor so chooses.

(11) Exhibit XI- An exhibit indicating whether a grant of the application may have a significant environmental effect under §1.1307, in which case the applicant must submit an Environmental Assessment, *see* §1.1311, and Commission environmental review must be completed prior to the construction of facilities. *See* §1.1312.

(c) Applications shall be filed as set forth below:

(1) An original and one paper copy of the application which must be enclosed in stiff covers and fastened securely along the left edge without exposed sharp edges (looseleaf binders, plastic binding strips, covered metal clasps) along with three microfiche copies in accordance with the requirements of Section 22.6 (d), including appropriate filing fees, must be filed at the Strip Commerce Center Facility in Pittsburgh, Pennsylvania.

(2) Applicants are required to submit as the cover page of their applications (i.e., immediately inside the cover and before the table of contents) a Transmittal Sheet For Cellular Applications for Unserved Areas. Copies of this transmittal sheet may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554. On the transmittal sheet applicants must list the market number or numbers and the market name or names in which the proposed unserved area is located. The information on the transmittal sheet must match exactly the information on the jacket of the microfiche and on the cover of the application. The Form 401 must immediately follow the transmittal sheet.

(i) The transmittal sheet will include a certification. All applicants must certify to the following in their applications.

(A) I hereby certify, under penalty of perjury, that this application for a cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that, if upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

(B) I also certify that I am the real party in interest in this application and there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. It is also certified that the applicant intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.

(C) Executed on _____

Applicant Signature _____

Print name _____

Title _____

(D) The certification must be signed in ink. No mechanical reproductions of signatures may be used. The certification must be dated and signed in accordance with the requirements of Section 1.743 of the Rules. The title of the person signing the certification must be indicated.

(3) The application, the filing fee, and the microfiche envelope shall be placed in a sealed envelope. The applicant's name and market name and number must prominently be displayed in the lower left hand corner of the envelope for all applications sent by mail and placed in the center of the envelope for applications delivered to the Strip Commerce Center Facility, at Pittsburgh, Pennsylvania.

(4) Applications may only request one CGSA per application. The proposed CGSA may include multiple 39dBu contours per application.

(5) Notification to the FAA, if necessary, must be undertaken at the time an applicant is announced the lottery winner by public notice or 45 days after the application has appeared on public notice as acceptable for filing if no mutually exclusive application is filed.

(d) Modified Facilities. Applications proposing modifications to existing stations which do not involve new facilities, an increase in height or power of existing facilities or an increase of any GCSA boundary may be filed on Form 489. *See* Section 22.9 (d)(7).

16. Section 22.925 is added to read as follows:

Section 22.925 SYSTEM INFORMATIONAL UPDATE

(a) Maps. Every existing cellular system in an MSA and RSA must file with the Commission 180 days prior to the expiration of the 5 year fill-in period, or within 30 days of the effective date of these rules, whichever occurs later, an updated map. This map must depict existing 39 dBu contours and the CGSA, as well as the boundaries of the MSA or RSA. This map must be on a scale of 1:250,000.

(b) Frequency Plan. At the same time a map is submitted pursuant to (a), an updated frequency utilization chart or frequency plan must be also submitted.

FOOTNOTES

[1] Cellular service has also been authorized in the Gulf of Mexico Service Area (GMSA). *See Petroleum Communications, Inc.*, Mimeo No. 6337 (Com. Car. Bur. August 14, 1985), *recon. denied*, 1 FCC Rcd 511 (1986). Administratively, we have treated the GMSA as MSA number 306. Hereinafter, reference to MSAs includes NECMAs and the GMSA.

[2] This five year period is referred to as the fill-in period. Applications filed during this period by licensees or permittees to serve unserved areas within the MSA or RSA but outside the Cellular Geographic Service Area (CGSA), are referred to as fill-in applications. Sections 22.31 (a)(1) and (f) state that applications for unserved areas within the MSA or RSA are not allowed to be filed by anyone, except the licensee or permittee, for a period of five years from the date of grant of the original construction authorization for each system. *See Rules for Rural Cellular Service (Second Report and Order)*, 2 FCC Rcd 2306 (1987); *Fifth Report and Order*, 3 FCC Rcd 6401 (1988). This rule also applies to the GMSA. *See Petroleum Communications, Inc.*, 3 FCC Rcd 399 (Mob. Ser. Div. 1988), *recon. denied*, DA 89-527 (Com. Car. Bur. May 18, 1989).

[3] This date certain filing procedure differed from traditional notice and cut-off rules employed for other Part 22 licensees. Under notice and cut-off procedures, applications are not filed on a date certain, but rather throughout the year at the election of the person seeking a license. Generally, applications for the same frequency in the same geographic area that are filed within sixty days of the public notice of the "first-filed application" are considered mutually exclusive and are entitled to comparative consideration or inclusion in the random selection process. *See* Section 22.31 of the rules. The Commission established date certain filings for cellular service in the top 30 markets because cellular was a new service, there was a particular need to establish prompt service and a large volume of applications was expected. *See Cellular Systems*, 89 FCC 2d 571 (1982). The Commission subsequently extended the date certain filing requirements to markets 31-90. *See Cellular Systems*, 90 FCC 2d 571 (1982). The date certain filing was subsequently adopted for all remaining MSAs, *see Cellular Lottery Order*, 98 FCC 2d 175 (1984), and for RSAs. *See Rules for Rural Cellular Service (Second Report and Order)*, 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989).

[4] SMSAs are now called MSAs. *See* Public Notice, Mimeo No. 6031 (Com. Car. Bur. released August 19, 1983).

[5] The CGSA is the geographic area served by a cellular system within which the licensee is authorized to provide service. *See* Section 22.2 and 22.903 (a).

[6] In *Cellular Lottery Order*, 98 FCC 2d at 198, we decided to retain the set-aside through the conclusion of the initial filing periods for the remaining MSAs and for the non-MSA/NECMA areas. These non-MSA/NECMA areas are now known as RSAs.

[7] By order dated April 10, 1989, the Common Carrier Bureau dismissed applications for unserved areas within MSAs which had been filed after the five year fill-in period because procedures for accepting, processing, and selecting and the date for filing, applications for unserved areas had not yet been established. *See Cellular Applications for Unserved Areas in MSAs /*

NECMAs, 4 FCC Rcd 3636 (1989). Petitions for reconsideration of this order are now pending. We will not act on these petitions for reconsideration until we resolve this Rule Making proceeding. Concurrently with the above cited order, a Public Notice was issued listing construction authorization dates and expiration dates of the five year fill-in period for both wireline and nonwireline MSA systems. *See List of Construction Authorization Dates and Expiration of Protected Period to Modify Cellular Geographic Service Areas in MSAs, Public Notice*, Report No. CL-89-126 (Com. Car.Bur. released April 10, 1989).

[8] *Rules for Rural Cellular Service (First Report and Order)*, 60 Rad. Reg. 2d (P&F) 1029 (1986); *modified*, 2 FCC Rcd 733 (1987); *further modified*, 2 FCC Rcd 3366 (1987); 4 FCC Rcd 5272 (1988); 3 FCC Rcd 4403 (1988); and 4 FCC Rcd 4464 (1989).

[9] Approximately 50 applications had been filed for unserved areas as of April 10, 1989. As noted previously, these applications were dismissed by the Common Carrier Bureau as prematurely filed. *See* note 7, *supra*.

[10] Of course, existing licensees are not excluded from filing applications for unserved areas, but obtain no preference in the random selection process.

[11] We would notify the public of the fill-in period expiration dates as expeditiously as possible through the issuance of informational public notices. However, under our proposal, applications could be filed on any date after the expiration of the fill-in periods for each unserved area regardless of the date of this public notice, or whether such a public notice has been released for the unserved area. For the 306 MSAs, the staff has already issued such a list. *See* note 7, *supra*.

[12] We anticipate that no RSA five-year fill-in period would expire prior to the effective date of these rules. Therefore, this alternative would only apply to MSAs in which a licensees's five-year fill-in period has expired or will expire during the one year period following the effective date of the rule.

[13] Under this proposed alternative, applications filed for the same frequency block before the expiration of the one year period and pending action after the one year period expires would be considered mutually exclusive notwithstanding the fact that the proposed facilities are not actually electrically mutually exclusive in terms of CGSA overlap.

[14] *See* discussion at paragraphs 36-37, *infra*, regarding use of random selection procedures.

[15] A daisy chain effect results when successively filed applications for the same frequency block are not necessarily mutually exclusive with the first filed application but are mutually exclusive with other applications which are in turn mutually exclusive with the first filed application. Under the proposed alternative one-year period discussed in paragraph 13, *supra*, the daisy chain rule would not be applicable.

[16] We remind applicants that at the time of filing a mutually exclusive application, Item 30 of Form 401 requires that they identify any known mutually exclusive applications. We also request comment on whether we should adopt a rule requiring dismissal of an application which fails to identify any mutually exclusive application placed on public notice prior to filing. Such a rule would ease our determination of mutual exclusivity and would motivate applicants to identify mutually exclusive applications. There may be instances where an applicant files an application but has not seen a public notice listing any mutually exclusive filings, or a mutually exclusive application may not yet have appeared on public notice. Applicants would be given 15 days from public notice of the earlier filed application with which they would be mutually exclusive, to amend their applications to update item 30 of Form 401 to identify the mutually exclusive application. Adoption of this proposal could justify not adopting our alternative proposal for a one-year transition period during which we would retain the cellular geographic boundaries because it would substantially ease staff processing burdens in determining mutual exclusivity, thereby weakening the justification for adopting the one-year transition alternative.

[17] As stated previously, there may be justification for retaining the geographic boundaries for a one-year transition period to ease staff processing burden and speed service to the public.

[18] The history of the five-year fill-in period is described in paragraphs 2-6, *supra*.

[19] We are proposing, both for unserved areas and existing licensees who have been allowed *de minimis* 39 dBu contour extensions, that during the five year fill-in period any such extension will not have interference protection, even if it has been considered part of the licensee's CGSA. However, after the five year period expires, the licensee whose 39 dBu contour includes *de minimis* coverage of the extension area will have interference protection in the area, which would, at that time, automatically become part of the licensee's CGSA. *See* para. 30 and Section IV C, *infra*. This proposal would exclude these *de minimis* extension areas from the definition of unserved areas.

[20] This proposal would be followed for the Gulf of Mexico Service Area as well.

[21] If either of these proposals were adopted we would also need to adopt rules with respect to what kind of documentation would have to be filed to permit us to determine where 39 dBu contours actually lie. One obvious possible rule would be that licensees must file updated maps showing existing 39 dBu contours.

[22] The "cellular service area" described above is the area actually served within a CGSA. We propose, in paragraph 24, *supra*, that in the future existing CGSA boundaries of current licensees be made coterminous with the actual boundaries of the cellular service area, except to the extent that the contours or CGSA extend beyond the MSA or RSA and are not eligible for interference protection. We also propose in paragraph 21, *supra*, that CGSAs for unserved areas be coterminous with such boundaries from the outset, subject to the same exception for *de minimis* contour extensions.

[23] When an existing RSA licensee transfers only a portion of the RSA license to another party, the transferee does not obtain five-year fill-in rights, unless the transferee obtains a signed statement transferring such rights from the licensee. *See* Section 22.31(f).

[24] For those licensees whose five-year fill-in period has already expired, we propose that they file the updated map and frequency utilization chart or a frequency plan within 30 days of the effective date of the final rules adopted in this Rule Making proceeding. We believe this time frame provides ample notice and opportunity for licensees to submit the updated information without delaying any longer than necessary the implementation of these new rules. The maps are needed by future applicants for unserved areas to determine and ascertain where these areas lie.

[25] 47 U.S.C. Section 309 (i).

[26] *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37-38 (1982).

[27] Those applicants not granted an authorization may file a new application that is not mutually exclusive with any previously granted application.

[28] *See Timothy Roper*, 4 FCC Rcd 4070 (1989) (letter perfect standard only applies to certain, specified pre-lottery filing requirements. These requirements are that the applicant for a cellular authorization must (1) certify to the completeness of its application, (2) submit an original application and paper duplicate, the cover of which has to include the applicant's name, market name, market number and frequency block for which it is applying, and (3) provide two microfiche copies of its application at the time of filing). *See, e.g., Jacksonville Cellular Telephone Co.*, 3 FCC Rcd 5386 (1988); *Pactel Mobile Access*, 1 FCC Rcd 564 (1986). In addition to continuing to apply the letter perfect standard we also propose to continue to dismiss applications which are unacceptable for filing pursuant to Section 22.20 of the rules, in accordance with existing Commission precedent. *See, e.g., Rem Communications*, 3 FCC Rcd 3705 (1988)(application dismissed because of illegible map submitted with application); *Clyde W. Pierce*, 4 FCC Rcd 2378 (1989) and *Douglas R. Casey*, 3 FCC Rcd 7193 (1988) (applications dismissed for improper signature). We will also look closely at whether parties are filing strike applications, or applications intended to obstruct or delay the processing of the first filed application. *See Grenco Inc.*, 21 Rad. Reg. 2d (P&F) 561, 562 (1971).

[29] Overlapping CGSAs refers to overlapping geographic areas.

[30] We remind applicants that they must file appropriate fees pursuant to Sections 1.1101- 1.1116.

[31] We delegate authority to the Managing Director to make any such rule changes.

[32] We recognize that if geographical boundaries are eliminated applications for unserved areas located in the same market will not necessarily be mutually exclusive. Nevertheless, the market number should narrow significantly the number of applications which need to be evaluated for mutual exclusivity.

[33] For the reduced map, applicants have a choice. This map may be reduced from the map with a scale of 1:250,000 or if the entire RSA or MSA cannot be depicted on the map with a scale of 1:250,000, a map with a scale of 1:500,000 may be used. The reduced map, which is used for Exhibit number II, must show all cell sites, 39 dbu contours and the entire RSA or MSA clearly labeled, with the boundaries visibly marked. *See* Proposed Rule 22.924(b)(2). The map which must be submitted with the hard copy of the application as Exhibit I must be on a scale of 1:250,000, regardless of which scale is used for the reduced map.

[34] *See* discussion on mutually exclusive applications at paragraphs 11-17, *supra*.

[35] Applicants for unserved areas, as is the case for all initial applicants, and applicants for major modifications of existing systems, may not commence construction of facilities until they have received from the Commission specifications for obstruction marking and lighting of antenna structures pursuant to Part 17. Licensees constructing facilities pursuant to Section 22.117(b) notification procedures are required to comply with the temporary marking and lighting requirements of Section 17.45 of the Rules until permanent marking and lighting specifications are prescribed by the Commission.

[36] If a current licensee files a fill-in application before the end of its five year fill-in period, the application may not be placed on public notice until after the five year fill-in period has expired. However, our previous orders require that competing applications cannot be filed against this application because the application was filed within the five year fill-in period. *See Second Report and Order*, 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989).

[37] We note that we continue to stand by the Commission's interpretation, in *Bill Welch*, that the Communications Act does not prohibit such sales.

[38] In addition to the proposals discussed in this section, some of our proposals discussed above also relate to all cellular licensees. *See* paras. 24-25 (CGSA modification); para. 33 (maps).

[39] Therefore, all licensees may begin service at the same time and this will override our previous policy which required that wireline notifications of completion of construction (FCC Form 489) appear on public notice for 14 days before the carrier started providing service to the public. *See* Public Notice, *Common Carrier Public Mobile Services Information-Initial Wireline License Applications*, Report No. CL-88-118 (Mob. Ser., Div. June 2, 1988).

[40] For unserved areas this policy would not be applicable in any case since there is no frequency set aside for wireline carriers.

[41] This five-percent rule would not apply in those situations where a general partner owns a small percentage of the partnership but, nonetheless, actually controls a system.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 13, 1990

THE NYNEX TELEPHONE COMPANIES FILE PETITION FOR WAIVER OF PART 69 TO ESTABLISH BUSY LINE VERIFICATION AND BUSY LINE VERIFICATION AND INTERRUPT SERVICES

Pleading Cycle Established

On January 29, 1990, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a petition for waiver of Part 69 of the Commission's Rules to permit the establishment of separate rates for two operator services -- (i) Busy Line Verification; and (ii) Busy Line Verification and Interrupt. On the same date, NYNEX filed Transmittal Nos. 1035 and 1024 proposing to provide Busy Line Verification and Busy Line Verification and Interrupt to interexchange carriers. This service would permit NYNEX to verify whether a line terminating within a local exchange is busy, or not in working order. This service would also, upon determination that the line is busy, interrupt the line and inform the parties on the line that someone is trying to complete a call to that line.

Interested parties should file comments regarding the NYNEX waiver petition no later than **March 30, 1990.** Reply comments should be filed no later than **April 30, 1990.** Petitions against the related tariffs should not be filed at this time. A pleading cycle with respect to the tariffs will be established by a subsequent Public Notice after completion of the pleading cycle established in this Public Notice relating to the NYNEX petition for waiver. Section 1.773(a)(2)(ii) of the Commission's Rules is waived for purposes of deferring petitions against the tariffs.

Parties are requested to furnish copies of their pleadings to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the NYNEX Telephone Companies' waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each pleading must be filed with ITS.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation Revisions to Tariff F.C.C. No. 1

Transmittal No. 119

ORDER

Adopted: February 13, 1990; Released: February 14, 1990

By the Chief, Common Carrier Bureau:

1. Rochester Telephone Corporation (Rochester) filed its Transmittal No. 119, effective February 15, 1990, as a mid-course correction, proposing a $5 million rate increase, including revisions to Carrier Common Line (CCL), End User Common Line (EUCL) (including a decrease), Switched Access, and Special Access rates. Equal Access Recovery Charge (EARC) and Local Transport rates are also decreased in the filing. Rochester seeks to retarget its earnings to the authorized 12 percent rate of return. MCI petitioned against Rochester's transmittal, arguing that Rochester's proposed $2.2 million Special Access rate increase is inadequately supported. MCI particularly states that Rochester's showing of jurisdictional shift in Central Office Equipment (COE) inventory is insufficient.

2. By letter dated February 8, 1990, Rochester requested special permission to revise its transmittal to remove the revisions to Rochester's Special Access rates. Under special permission, Rochester filed a revised Transmittal No. 119 on February 12, 1990, to be effective February 15, 1990.

3. Rochester's removal of special access rate increases from its transmittal moots MCI's petition, thereby eliminating the sole opposition to Rochester's tariff. We find no compelling reason to reject or suspend Rochester's proposed rate revisions.

4. Accordingly, IT IS ORDERED that the petition filed by MCI Communications Corporation against Rochester Telephone Corporation Tariff F.C.C. No. 1, Transmittal No. 119, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35 Clear Channel Capacity — Transmittal Nos. 546 and 561

ORDER

Adopted: February 14, 1990; Released: February 14, 1990

By the Chief, Common Carrier Bureau:

1. Cincinnati Bell Telephone Company (CBT) Transmittal No. 546, filed November 17, 1989 and scheduled to become effective February 15, 1990, would modify CBT's DS1 high capacity service by offering optional Clear Channel Capacity (CCC), which by use of a different coding scheme provides customers with both increased capacity and greater flexibility in use of the service. A petition to reject or suspend was filed December 4, 1989 by MCI Telecommunications Corporation (MCI), and CBT filed its reply December 14, 1989.

2. MCI contends that CBT, by establishing a monthly recurring rate of $32 per channel termination as well as nonrecurring charges that concededly encompass "the entire expense associated with its provisioning,"[1] has strategically priced CCC and so contradicted the holding of the Commission's recent *Strategic Pricing Reconsideration Order*.[2] MCI Petition at 1-2. MCI also asserts the CBT offering violates Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, respecting cost support, and Section 201(b) of the Act, 47 U.S.C. § 201(b), which requires that all charges be just and reasonable. CBT replies that it set the recurring rate at a level reflecting the significant service benefits to customers, and notes that the *Strategic Pricing Reconsideration Order* was adopted after its revisions were filed, and the full text of that Order was not yet available when its reply was due. CBT also asserts that the market will determine whether it has accurately evaluated the benefit of this new optional service by its pricing. CBT Reply at 2-3.

3. Under authority of Special Permission No. 90-147, CBT on February 12, 1990 filed Transmittal No. 561, reducing the recurring rate element for the CCC option to zero, effective February 15, 1990. As MCI had not complained of the nonrecurring rate, this revision effectively moots MCI's petition.

4. The Common Carrier Bureau has reviewed CBT's Transmittal Nos. 546 and 561, the petitioner's assertions, and related pleadings. As the recurring rate element for Clear Channel Capacity has effectively been eliminated, we conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, suspend or investigate Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 546, filed by MCI Telecommunications Corporation, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] CBT Description and Justification, at 4.

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, FCC 89-330, Jan. 19, 1989 (*Strategic Pricing Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

Revisions to Transmittal No. 252
United Telephone Company
Tariff F.C.C. No. 1

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

ORDER

Adopted: February 14, 1990; Released: February 14, 1990

By the Chief, Common Carrier Bureau:

1. United filed, under special permission, its Transmittal No. 252 proposing certain rate increases. MCI Communications Corporation (MCI) filed a petition against Transmittal 252, and United replied.

2. United Transmittal 251 reduces Traffic Sensitive Switched Access rates for United of Ohio and United Midwest Group, and reduces Special Access rates for United of Indiana. Transmittal 252 increases rates for certain other access service categories for United of Ohio and United Midwest Group.

3. MCI petitions to suspend and investigate United Transmittal 252, arguing that MCI does not believe that conditions could have changed enough between December 4, 1989, when United submitted a mid-course correction, and January 22, 1990, when United filed Transmittal 252, to justify a second mid- course filing. MCI Petition at 2. MCI states that the cost support provided in the current filing shows numerous unexplained changes from that provided in the December filing. *Id.*

4. United replies by noting that this transmittal, unlike United's December mid-course filing, concerns United of Ohio and United Midwest Group. United Reply at 1-2. United stands by its Description and Justification. United explains the apparent discrepancies between the cost support data for the two filings by stating that the December Common Line data included revenues and offsetting expenses associated with the Universal Service Fund, but that these revenues and expenses are not relevant to the rate increases proposed in Transmittal 252. The Universal Service Fund expenses and revenues were accordingly omitted from the Transmittal 252 data in an effort to reflect the rate development process as accurately and simply as possible. *Id.* at 4. The data are otherwise identical, United states. *Id.*

5. We conclude that MCI has made no compelling showing that United's tariff filing is so patently unlawful as to require rejection, and that investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition of MCI Communications Corporation against United Telephone Company Tariff F.C.C. No. 1, Transmittal No. 252 IS DENIED.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

MEMORANDUM OPINION AND ORDER AND SUPPLEMENTAL ORDER TO SHOW CAUSE

Adopted: February 14, 1990; Released: February 15, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 5, 1990, the Common Carrier Bureau (Bureau) released an Order To Show Cause in the above-captioned docket.[1] In that Order, we directed certain local exchange carriers (LECs) to reduce specified rates, or to show cause why we should not prescribe reduced rates.[2] GTE Service Corporation, GTE North, Inc., and GTE Northwest, Inc.; Pacific Bell; and Southwestern Bell Telephone (SWB) were among the carriers that filed rate reductions. American Telephone and Telegraph Company (AT&T) filed a petition against the GTOC filing. [3]

II. BACKGROUND

2. A recent Commission Order reviewed the history and application of the Commission's authority to prescribe rates if necessary to effect its statutory mandate.[4] As noted in that Order, the Communications Act of 1934 (the Act) grants the Commission a mandate to regulate "so as to make available . . . efficient, Nation-wide . . . communications service, with adequate facilities at reasonable charges. . . . "[5] Title II of the Act requires that carriers' rates for communications services be just, reasonable, and non-discriminatory.[6] The Act provides the Commission with various tools to fulfill its regulatory functions. Some of these tools give the Commission the means to affect rates indirectly, such as by prescribing a carrier's accounting system and depreciation rates,[7] or controlling its entry into or exit from the interstate market.[8]

3. Other provisions of the Act are connected more directly with the ratemaking process. Section 203 authorizes the Commission to determine the information that must accompany a carrier's tariff filings, while Section 204 empowers the Commission to investigate the lawfulness of proposed rates and, pending hearing, suspend the effectiveness of those rates for up to five months.[9] Section 205 of the Act also grants the Commission the authority, after a full opportunity for hearing, "to determine and prescribe" just and reasonable rates or practices "to be thereafter observed."[10]

4. The statute provides the Commission broad authority to effectuate its provisions and to penalize those who violate them. Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[11] Title V contains provisions authorizing the levying of fines and forfeitures.[12] In 1972, the Commission, in an effort to carry out its responsibilities in a more effective and expeditious manner, asserted the authority to prescribe the rate of return a carrier may earn. That authority was upheld in 1975 by the U.S. Court of Appeals for the District of Columbia Circuit.[13]

5. Prior to 1984, the Commission exercised this authority to prescribe a rate of return for a single entity: the Bell System.[14] As a result of the telecommunications industry's structure at the time, the regulatory effect of this single prescription affected the industry as a whole.[15] The subsequent Bell System divestiture and the concurrent development of the access charge system altered the industry's structure fundamentally,[16] and created the prospect of having to prescribe a rate of return not just for a single entity, but for all eight entities that emerged after divestiture (*i.e.*, AT&T and the seven Regional Bell Holding Companies) and approximately 1,400 other LECs as well.

6. Faced with this prospect, the Commission adopted, in a broad Rule Making proceeding: (1) methodologies to be used to prescribe maximum rates of return for AT&T and local exchange carriers, (2) procedures for prescribing rates of return on a regular basis, (3) a system of monitoring carriers' earnings, and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[17] The Commission established both an authorized return and a "spread" or "buffer" above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized or target return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return "to determine whether a rate of return prescription has been violated."[18] The Commission also defined particular time periods for measuring compliance with the prescribed return.[19]

7. Under the Access Charge Rules, Part 69 of the Commission's Rules, 47 C.F.R. Part 69, LECs are required to target their access rates to the authorized rate of return, both in required annual filings and in any voluntary mid-course filings. The *Tariff Filing Deferral Order* recognized that the use of fifteen month access periods increased the risk that rates would not be targeted with sufficient accuracy to comply with the rate of return prescription if LECs did not retarget their rates voluntarily as needed.[20] The Commission directed the Bureau "to make any necessary adjustments should carriers fail to initiate adjustments themselves." 3 FCC Rcd at 5496. Accordingly, the Bureau has directed LECs with rates -earning apparently excessive returns to show cause why the rates should not be reduced.

8. The *Order To Show Cause* found that many LECs appeared to have realized returns in excess of 12.4 percent in one or more of the Part 65 reporting categories for the first six months of the current fifteen month access period. The Order noted that LECs have filed adjusted rates to reflect certain changes effective in calendar 1990 that

were not reflected in the April through December 1989 test period (used by the LECs to project cost and demand in order to compute the access rates that became effective on April 1, 1989),[21] but that those adjustments would not correct rates to reflect any errors in the April through December 1989 test period projections. Thus, a separate adjustment was required for rates that were not accurately targeted for an April through December 1989 test period. Some LECs that achieved category earnings in excess of 12.4 percent during the April through September 1989 period filed mid-course reductions to adjust for such test year projection errors, the Order noted, but others did not. The latter carriers were accordingly directed either to file tariff transmittals reducing the relevant rates to retarget those rates to produce a category return that does not exceed 12.0 percent for the February through June 1990 period, or to show cause why failure to reduce such rates would not result in excessive category earnings for the April 1989 through June 1990 access period.[22]

III. DISCUSSION

9. As we discussed in a previous section, the Communications Act gives the Commission not only a mandate, but also the authority and the regulatory tools to effect that mandate. One of these tools is prescription.

10. In our *Order To Show Cause*, the Bureau directed LECs with rates earning apparently excessive returns to show cause why the rates should not be reduced. This Order considers rates that were reduced by a smaller amount than would appear to be required to bring the rates within the authorized rate of return for the tariff period.[23] Pursuant to Section 205 of the Act, and the standard established in *Nader*, the Commission has authority to prescribe rates if, after full opportunity for hearing, the Commission determines that a rate is or will be in violation of the Communications Act. The *Order To Show Cause* gave carriers notice of our belief that certain rates appeared to be unlawfully high. The carriers whose rates are considered here filed rate reductions, not answers – but reductions that are apparently inadequate. Accordingly, we are directing these carriers to further reduce their rates as indicated in Attachment B herein, or to file answers showing why the rates should not be reduced.

11. The *Order To Show Cause* directed several of the GTOC companies to reduce specific rates or to show cause why no reductions were necessary. Several GTOC companies filed rate reductions that, by our calculations, appear to be adequate to correct the overearning. But GTOC companies for Iowa, Michigan, Minnesota, and Ohio, while ostensibly using the same methodologies and calculations as those companies whose rate reductions appear to be adequate, have proposed reductions that are not sufficient, based upon the calculations we have made after reviewing each carrier's relevant Form 492. These companies do not offer any explanation, such as special circumstances or unforeseen changes, for their apparently excessive rates. While the calculations these companies provide do not correspond to the calculations we have made regarding their rate levels, we are not able, based on the information before us, to ascertain whether the proposed rates warrant prescription. Although the proposed rates will become effective as scheduled on February 15, these companies are directed to further reduce these rates, as shown in Attachment B herein, or to show cause why reduced rate levels should not be prescribed. The tariff filing or answer to this Supplemental Order To Show Cause shall be filed not later than February 22, 1990; comments or petitions on these filings may be submitted not later than March 1, 1990; reply comments may be filed not later than March 8, 1990.

12. Pacific, faced with a requirement to reduce or show cause for overearnings in two categories, Special Access and Switched Access, has filed rates for Switched Access that apparently target a 12 percent rate of return. In Special Access, however, Pacific's proposed reduction appears to be inadequate, as it still appears to result in overearnings, and thus unlawful rates. Pacific states that in both categories it relies on actual data, as reflected in its quarterly reports, to calculate its rates. The revenue data upon which Pacific calculates its Special Access rates, however, show $2 million less than is shown in Pacific's Forms 492. Absent further explanation or justification, it appears that the Special Access rates filed by Pacific are unlawfully high. While the new rates will become effective on February 15 as scheduled, Pacific is ordered to show cause why reduced Special Access rates should not be prescribed. Pacific's tariff filing or answer to this Supplemental Order To Show Cause shall be filed not later than February 22, 1990; comments or petitions on these filings may be submitted not later than March 1, 1990; reply comments may be filed not later than March 8, 1990.

13. SWB was directed to reduce or justify its CL rates. Although SWB has filed a rate reduction for CL, that reduction is substantially less than appears to be required. SWB's data show revenues considerably lower, and average net investment considerably higher, than are calculated from SWB's Forms 492. Upon examination, it appears that SWB has used an inconsistent methodology to determine its projected revenues and expenses. In Transmittal No. 1930, SWB developed projected Common Line revenues based on minutes of use data contained in its November 2, 1989, tariff update filing (which simply updated SWB's April 1989 projections). To calculate expenses, however, SWB annualized actual data from its historical records.

14. SWB's calculation of projected revenues from an apparently understated April 1989 projection, rather than from its quarterly reports' actual data, results in a CL rate that appears to be excessive. Reliance on actual second and third quarter 1989 data obtained from SWB's FCC Forms 492 to form a revenue projection is a more consistent and valid method of rate calculation, and is more likely to yield accurate results. Based on this analysis of SWB's data, SWB's revenues must be reduced by $28.31 million on an annual basis. Although SWB has reduced its rates to reduce its Common Line revenues by $13.75 million, this reduction is inadequate, as it produces a rate that apparently results in overearning. We accordingly conclude that a further reduction of $14.54 million should be made in SWB's Common Line rates. While SWB's rates will become effective as scheduled on February 15, we are directing SWB to reduce these rates as indicated in Attachment B herein, or to show cause why these rate levels should not be prescribed. SWB's tariff filing or answer to this Supplemental Order To Show Cause shall be filed not later than February 22, 1990; comments or petitions relating to these filings may be submitted not later than March 1, 1990; reply comments may be filed not later than March 8, 1990.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that GTE North, Inc., in the states of Iowa, Michigan, Minnesota and Ohio SHALL REVISE THEIR RATES to levels as shown in Attachment B, or SHALL SHOW CAUSE why their rates should not be subject to prescription, in a filing submitted no later than February 22, 1990.

16. IT IS FURTHER ORDERED that Pacific Bell SHALL REVISE Special Access rates to levels as indicated in Attachment B, or SHALL SHOW CAUSE why its rates should not be subject to prescription, in a filing submitted no later than February 22, 1990.

17. IT IS FURTHER ORDERED that the Southwestern Bell Telephone Company SHALL REVISE Common Line rates to levels as indicated in Attachment B or SHALL SHOW CAUSE why its rates should not be subject to prescription, in a filing submitted no later than February 22, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Attachment B

Table 5A
TOTAL SHEATH MILES
(LOOP PLUS INTEROFFICE)

	Total	Copper	Fiber
1980			
1981			
1982			
1983			
1984			
1985			
1986			
1987			
1988			
1989			
1990			
1991			
1992			
1993			
1994			

Note: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown.

Attachment B

Table 5B
TRANSMISSION FACILITIES - INTEROFFICE

WORKING

	Circuits		Carrier Links (Spans)				
			----Analog----		----------Digital----------		
	Baseband	Analog CXR	Digital CXR	Copper	Radio	Copper	Radio	Fiber
1980								
1981								
1982								
1983								
1984								
1985								
1986								
1987								
1988								
1989								
1990								
1991								
1992								
1993								
1994								

Notes: For 1980 to 1989, year-end actual figures are to be shown. For 1990 to 1994, projected year-end figures are to be shown. Digital carrier links are to be reported in DS1 equivalents.

FOOTNOTES

[1] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Order To Show Cause, DA 90-11, released Jan. 5, 1990 (*Order To Show Cause*).

[2] Attachment A shows the attachment from the *Order To Show Cause* specifying which rates of which carriers were targeted. Centel of Texas notes that it is a Tier 2, not a Tier 1, company, and it is accordingly deleted from the list. Similarly, Lincoln Telephone notes that it is a member of the National Exchange Carrier Association (NECA) common line pool, and it is accordingly deleted from the list of carriers directed to reduce their Common Line rates.

[3] AT&T petitioned for suspension and investigation of GTOC Transmittal No. 566 on grounds that have been deferred for future, separate consideration, pursuant to GTOC Transmittal No. 570, filed Feb. 12, 1990.

[4] MCI Telecommunications v. Pacific Northwest Bell Telephone, File Nos. E-88-44 through E-88-55, FCC 89-344, released Jan. 9, 1990 (*MCI Complaint Order*).

[5] 47 U.S.C. § 151.

[6] 47 U.S.C. §§ 201(b), 202(a).

[7] 47 U.S.C. § 220.

[8] 47 U.S.C. § 214.

[9] 47 U.S.C. §§ 203-204.

[10] 47 U.S.C. § 205(a).

[11] 47 U.S.C. § 154(i).

[12] 47 U.S.C. §§ 501 *et seq*.

[13] Nader v. FCC, 520 F.2d 182, 203-04 (D.C. Cir. 1975) (*Nader*). The D.C. Circuit ruled that such rate of return prescriptions are "necessary for the Commission to carry out its [ratemaking] functions in an expeditious manner." *Nader*, 520 F.2d at 204.

[14] On one occasion during this period, AT&T's earnings exceeded the return established by the Commission for determining compliance with the Commission's prescription. The Commission's Order directing AT&T to refund its overearnings was upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See* New England Telephone and Telegraph Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987) (*New England Telephone*), *cert. denied*, 109 S. Ct. 1942 (1989).

[15] Although the Commission prescribed a rate of return for the Bell System alone and not for so-called "independent" (*i.e.*, non-Bell) local exchange carriers, the return prescribed for the Bell System operated indirectly as a check on the justness and reasonableness of all local exchange carrier earnings because of the existence of a process known as "settlements and division of revenues." Essentially, this process entailed the pooling of costs and revenues among the Bell System companies and, separately, between them and the independents. The process was referred to as a "partnership" because it helped all the participants achieve a relatively stable and uniform return on their investment. For a more complete discussion of the "partnership" process and its impact on the industry, see MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 224, 226-31 (1980); MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of Federal-State Joint Board, Recommended Decision and Order, 2 FCC Rcd 2324, 2337-40 (1987).

[16] The Commission has prescribed for all local exchange carriers, including the responding carriers in this proceeding, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure. The access charge system is codified in Part 69 of the Commission's Rules. *See* 47 C.F.R. §§ 69.1 *et seq*. These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With few exceptions not relevant to this proceeding, these appeals were denied by the D.C. Circuit. *See* NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[17] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41250 (Oct. 10, 1985), (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released Mar. 24, 1986), 51 Fed. Reg. 1103 (Apr. 1, 1986) (*Phase I Reconsideration*) ; *on further reconsideration*, FCC 86-544 (released Jan. 14, 1987). *See also* Procedures and Methodologies To Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[18] *Phase I Order*, 50 Fed. Reg. at 41353.

[19] *See, e. g., Phase I* Ord er, 50 Fed. Reg. at 41350, para. 1 ("In this phase of the proceeding, we address the maximum allowable rates of return and enforcement procedures for the regulated . . . interstate access services of local exchange carriers . . . "); id. at 41352, para. 22 (Commission affirms decision tentatively adopted at earlier stage of proceeding that it "should not prescribe a minimum return requirement"); *see also New England Telephone*, 826 F.2d at 1109 (noting the Commission's practice not to set minimum guaranteed rates of return); butcf.AT&Tv.FCC, 836 F.2d 1386 (D.C. Cir. 1988) (expressing the belief that the prescription is the minimum possible return: it is both the "minimum and maximum").

[20] Access Tariff Filing Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988) (*Tariff Filing Deferral Order*).

[21] *Order To Show Cause* at para. 3 (citing January 1, 1990, Local Exchange Carrier Access Tariff Filings, released Dec. 21, 1989 (1989 *Access Order*).

[22] For this purpose, the "category" return means the category the Commission selected in the Part 65 rules for purposes of monitoring compliance with the access rate of return prescription.

[23] We will examine in a separate Order the rates of carriers named in the *Order To Show Cause* that did not elect to file reduced rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-616

In the Matter of

Petition for Waiver of
Eight-Month Limitation
for U S West's Voice Storage
Market Trial

BOC Notices of Compliance with
CEI Waiver Requirements for
Market Trials of Enhanced Services

ORDER

Adopted: February 16, 1990; Released: February 20, 1990

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On November 13, 1989, U S West, Inc. (U S West) filed a petition requesting waiver of the maximum eight month period for conducting enhanced service market trials without approval of a Comparably Efficient Interconnection (CEI) plan.[1] In this Order, we waive this requirement to allow U S West an additional four months, through June 16, 1990, to complete the market trial of its voice (audiotex) storage service.

II. BACKGROUND

2. In the *Market Trial Waiver Order*, we permitted the Bell Operating Companies (BOCs) to conduct enhanced service market trials without filing and receiving approval of CEI plans subject to six conditions.[2] These conditions provide that: (1) the market trial cannot be longer than eight months in length; (2) market trial costs must be allocated in accordance with approved Cost Allocation Manuals; (3) the BOCs "must inform end user trial participants that services and prices available during the trial may not be available after the close of the trial;" [3] (4) "competing enhanced service providers (ESPs) must receive equal access, at equivalent prices, for all basic network services used in the trial;"[4] (5) the BOCs must inform ESPs of trials ninety days in advance; and (6) the BOCs must observe the customer proprietary network information (CPNI) rules and network disclosure rules established in *Computer III*.[5]

III. THE PETITION

3. U S West requests a waiver of the eight-month limitation for enhanced service market trials to allow it to extend its voice storage market trial through June 16, 1990.[6] U S West states that this extension is necessary to allow it to obtain a sufficient number of participants for this market trial since U S West has focused its marketing efforts on potential participants that are not yet familiar with voice storage service and the benefits that such a service can offer.[7] As a result, U S West states that it had only three market trial participants as of November 13, 1989, although it had hoped to have ten.[8] Given its limited ability to attract participants, U S West argues that it would be effectively prevented from conducting a market trial of its voice storage service for the full eight months if it were required to terminate the trial as currently scheduled.[9] U S West argues that under the circumstances, there is no possibility for anticompetitive conduct on its part if the market trial is extended four months.[10] In particular, U S West contends that its trial cannot be viewed as the offering of an enhanced service "on an ongoing basis" because it only has three trial participants.[11] U S West also states that it has made the basic services underlying its enhanced voice storage service available to all competitors under the same terms and conditions.[12]

IV. POSITIONS OF THE PARTIES

4. Southwestern Bell Telephone (SWBT) filed comments in support of U S West's petition.[13] SWBT notes that it too has been involved in enhanced service market trials,[14] and argues that, based on its experience, the BOCs need "appreciable amounts of time" to introduce new enhanced services and secure trial participants.[15] Moreover, SWBT argues that there are no significant competitive risks involved in allowing a BOC sufficient time to determine whether and how to offer new enhanced services as long as the BOC continues to adhere to the other conditions established in the *Market Trial Waiver Order*.[16]

5. Phonequest, Inc. (Phonequest) and Telcom Design, Inc. (Telcom) filed joint reply comments opposing U S West's petition.[17] They argue that U S West "is not acting in a fair and even-handed manner in the implementation and offering of its enhanced services."[18] Phonequest contends that U S West actually has only one trial participant, U S West itself.[19] Phonequest also states that it repeatedly sought information from U S West on how to use U S West's voice storage equipment for 976 service during the market trial, but U S West failed to respond.[20] Thus, Phonequest states that it believes U S West is only conducting the market trial to test its own information service concerning employment opportunities within U S West.[21]

6. Telcom also requests an investigation into the manner in which U S West is accounting for its voice storage service costs,[22] stating that it could have provided U S West with equipment for its market trial at a price lower than that it believes U S West actually paid.[23] Telcom adds that U S West did not give it an opportunity to bid on this equipment, and argues that a fair and open market trial would have provided Telcom with such an opportunity.[24]

7. Telcom further argues that U S West may be engaging "in the same type of 'milk-the-operating-companies' conduct [that] this Commission recently identified at NYNEX."[25] In particular, Telcom questions the activities of U S West's real estate affiliate and argues that U S West's market trial is just "another device to siphon profits from ratepayers to shareholders and cross-subsidize

enhanced services that are - or soon will be - in competition with those offered by Phonequest and Telcom."[26] Phonequest and Telcom also contend that the public interest will not be served by the development of enhanced services "within this mesh of cross-subsidies."[27] In addition, Phonequest and Telcom argue that U S West does not want to do business with other enhanced service providers, but, rather, plans to monopolize the audiotex and videotex markets "through control of its 'essential facility,' the access line between its central offices and its customers, and through its unique ability to offer 'bundled' transport and billing/collection services."[28]

8. U S West filed a motion to strike Phonequest and Telcom's filing on the grounds it was improperly filed as a reply instead of opening comments.[29] U S West states that Phonequest and Telcom comment on matters raised in the U S West petition rather than responding to Southwestern Bell's comments, as required by our rules.[30] U S West adds that the result of Phonequest and Telcom's filing in the reply round is to foreclose any opportunity for U S West to respond to their charges.[31]

9. In the alternative, U S West asks that we accept its filing as supplemental comments. U S West argues that Phonequest and Telcom's allegations are not relevant to whether U S West should be allowed an additional four months to conduct its voice (audiotex) storage market trial.[32] In support of this contention, U S West states that Phonequest and Telcom's objections are addressed to matters that U S West views as beyond the Commission's jurisdiction,[33] and issues that have already been resolved in our *Computer III* and *Joint Cost Allocation* proceedings.[34]

10. U S West disputes Telcom's claim that U S West's accounting for its market trial should be investigated because Telcom could have provided U S West with cheaper voice storage equipment.[35] U S West states that the *Joint Cost Allocation* rules are designed to ensure that an RBOC's regulated operations do not cross-subsidize its unregulated services,[36] and maintains that it is properly accounting for the costs of its voice storage market trial and has complied with the network disclosure requirements established in *Computer III*.[37] U S West states that as long as it satisfies these requirements, it may purchase enhanced services equipment as it chooses.[38] Finally, U S West reiterates that it has made the basic services underlying its enhanced service available to all other providers on a non-discriminatory basis throughout its trial.[39] Thus, U S West states that Phonequest and Telcom's allegation that U S West intends to monopolize the audiotex and videotex markets through control of essential access facilities is without merit.[40]

V. DISCUSSION

11. We find that U S West has shown ample justification for the requested four-month extension of its voice storage market trial. Given the difficulty U S West has had attracting trial participants, we agree with U S West's contention that an eight-month period would be insufficient to allow U S West to acquire the information needed for a determination of whether, and if so, how such an enhanced service could be provided. An extension of the trial period for this purpose is entirely consistent with our goals in establishing a system of CEI waivers for market trials.[41] Furthermore, in light of the very small number of participants, there is no reason for concern that this represents an effort to offer an enhanced service on an ongoing basis without compliance with our CEI requirements.[42]

12. We agree with U S West that Phonequest and Telcom make no arguments pertinent to whether an extension of U S West's market trial should be granted.[43] The basic questions concerning safeguards for the provision of enhanced services by the BOCs have been addressed at length in our *Computer III* proceeding.[44] We have also implemented cost allocation rules, including specific measures concerning affiliate transactions, to ensure that regulated services do not subsidize enhanced service operations.[45] We decline to review these policy determinations in the context of this proceeding. We also decline to investigate U S West's allocation of the costs for its market trial based on Phonequest's and Telcom's unsupported claims. If Phonequest or Telcom believe that U S West is violating our *Computer III* or *Joint Cost Allocation* rules, they are free to raise these allegations in separate proceedings. We also note that a number of Phonequest and Telcom's allegations focus on aspects of U S West's conduct of the market trial (such as marketing and equipment provisioning) that are not currently the subject of regulatory requirements. Accordingly, we do not believe that Phonequest's and Telcom's allegations warrant rejection of U S West's petition for a four-month extension of its voice storage service market trial.

VI. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, U S West's petition for waiver of the eight-month period for conducting its voice storage market trial, IS GRANTED, to allow U S West to continue its voice (audiotex) storage market trial through June 16, 1990.

14. IT IS FURTHER ORDERED, that U S West's motion to strike the filing by Phonequest and Telcom IS DENIED, and that U S West's request for acceptance of its filing as supplemental comments IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Waiver of Eight-Month Limitation for U S West's Voice Storage Market Trial, filed November 13, 1989.

[2] BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, CC Docket No. 88-616, 4 FCC Rcd 1266 at 1272 (1989).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Petition at 1.

[7] *Id.* at 3-4.

[8] *Id.* at 4-5.

[9] *Id.* at 5. U S West states that it needs a "full eight months of a meaningful market trial with a reasonable number of participants" to obtain the information necessary to determine how to offer and market this service effectively. *Id.*

[10] *Id.* at 6.

[11] *Id.*

[12] *Id.* at 6-7. U S West also states that it will continue to comply with all of the other conditions and limitations imposed by the *Market Trial Waiver Order*. *Id.* at 7, n. 16.

[13] Comments of Southwestern Bell Telephone Company, filed January 10, 1990.

[14] *Id.* at 2.

[15] *Id.*

[16] *Id.*

[17] Reply Comments of Phonequest, Inc. and Telcom Design, Inc. Regarding Petition for Waiver of Eight-Month Limitation for U S West's Voice Storage Market Trial, filed January 24, 1990.

[18] *Id.* at 1.

[19] *Id.* at 2.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 3-4.

[27] *Id.* at 4.

[28] *Id.*

[29] Motion to Strike Reply Comments of Phonequest, Inc. and Telcom Design, Inc., or in the Alternative, to Accept Supplemental Comments of U S West, filed February 1, 1990 (supplemental comments).

[30] Supplemental Comments at 3. Section 1.45 (b) of the Commission's rules, 47 C.F.R. § 1.45 (b), states, *inter alia*, that replies "shall be limited to matters raised in the oppositions." *Id.* at 3.

[31] *Id.*

[32] *Id.* at 4.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 6.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 7. U S West also states that it obtained bids for this equipment. *Id.* at 7, n. 15.

[39] *Id.* U S West also reiterates that it has contracted with three customers: an unaffiliated 976 provider, a Denver film festival and the U S West Marketing Resources Group, and states that it has provided Phonequest with information concerning the market trial. *Id.* at 5-6. U S West adds that the enhanced service on U S West employment opportunities described by Phonequest does not exist, although U S West has a "staffing hotline" that is not part of this trial. *Id.*

[40] *Id.* at 7.

[41] In the *Market Trial Waiver Order*, we specifically stated that a major purpose of permitting such trials is to allow the BOCs to obtain the information they need to determine whether and how to provide new enhanced services to the public. 4 FCC Rcd at 1271-72.

[42] The *Market Trial Waiver Order* states that we will not extend CEI waivers to enhanced service "offerings," adding that proposals to conduct trials involving a large number of participants and geographic areas may be denied on the ground that they constitute the initial stages of an enhanced service "offering". *Id.* at 1274, n. 98.

[43] Although Phonequest and Telcom's arguments are more appropriate for inclusion in initial comments rather than a reply, we will address their contentions on the merits. Accordingly, we deny U S West's motion to strike the filing by Phonequest and Telcom and grant U S West's request for acceptance of its filing as supplemental comments.

[44] Amendment of Sections 64.602 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second further Reconsideration*), *appeals pending sub nom. California v. FCC*, no. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[45] Separation of costs of regulated telephone service from costs of nonregulated activities, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Order on Further Reconsideration*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 22, 1990

ANNOUNCEMENT OF EIGHTY-FOURTH INTELSAT BOARD OF GOVERNORS' MEETING

The Board of Governors of INTELSAT will hold its 84th meeting March 8th through 14th, 1990. Comsat, as U.S. Signatory to INTELSAT, will represent the United States at this meeting. Consistent with the Commission's directives and criteria in its initial Order in CC Docket No. 80-634 (*Comsat Structure Order*) concerning the public dissemination of INTELSAT-related documents and information, the agenda of BG-84 and certain related documents will be available for public inspection in Room 533, 1919 M St., Washington, D.C., on a daily basis as these documents are received by the Commission.

The public is invited to comment in writing on the issues that will be addressed at this INTELSAT meeting prior to the issuance of government instructions to Comsat. Comments will be reviewed and considered to the extent that time allows and may, if deemed appropriate, be incorporated into specific instructions. Because of the typically short periods of time between government receipt of the agenda and related documents and the time that instructions must be formulated, we urge parties wishing to comment to do so in a concise manner and as early as possible.

Parties should submit their comments as follows. The original and three copies should be sent to the Office of Assistant Bureau Chief/International, Common Carrier Bureau, Room 534, Federal Communications Commission, Washington, D.C. 20554, for inclusion in the public file. (Because of the informal nature of this mechanism, parties need not file copies with the Secretary of the FCC). In addition, a copy is to be forwarded to the Office of International Affairs, National Telecommunications and Information Administration, Room 4701, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230 and to Bureau of International Communications and Information Policy, U.S. Department of State, CIP/SCP, Washington, D.C. 20520. Comments should be labeled as File No. BG-84.

For further information contact Joel Pearlman at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 90-41
37892

In the Matter of	)
	)
The Petition of the New York Telephone	)
Company for a Declaratory Ruling with	)
Respect to the Physically Intrastate	)
Private Line and Special Access Channels	)
Utilized for Sales Agents to Computer	)
New York State Lottery Communications	)

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1990 Released: February 21, 1990

By the Commission:

I. INTRODUCTION

1. On August 17, 1987, the New York Telephone Company (NYT) filed a Petition for Declaratory Ruling (petition) raising the question of whether the mixed-use special access lines[1] used by the New York State Lottery (Lottery) must be provided to the American Telephone and Telegraph Company (AT&T) at rates contained in NYT's interstate access tariffs rather than the rates in NYT's intrastate tariffs. Specifically, NYT requests a ruling from the Commission that the addition of two physically interstate private lines to the Lottery network that is otherwise comprised of physically intrastate lines does not require NYT to classify all of the Lottery's special access lines as interstate. NYT noted that the reasoning in the Commission's Hecht Reconsideration Order[2] could be interpreted to require that all of the Lottery special access lines be billed at the interstate rate. NYT, therefore, requests that the Commission declare that NYT may charge intrastate tariff rates for the mixed-use special access facilities provided for use in the Lottery network. On January 15, 1988, nine parties filed comments on NYT's petition.[3] Reply comments were filed by seven parties on February 5,

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1 Mixed-use special access lines or facilities are those lines or facilities that NYT provides to AT&T for use in the Lottery network that are not connected to one of the two physically interstate private lines in the Lottery network, i.e., special access lines or facilities that are typically provided for use in conjunction with the physically intrastate private lines in the Lottery network.

2. See Chesapeake & Potomac Tel. Co., FCC 85-465 (released Aug. 16, 1985), modified on recon., 2 FCC Rcd 3528 (Hecht Reconsideration Order), vacated as moot, Hecht Co. v. FCC, No. 87-1396 (D.C. Cir. Dec. 7, 1987).

3 Parties filing comments were: NYT; the New York State Department of Public Service (NYDPS); Pacific Bell (Pacific); Southwestern Bell Telephone Company

1988.[4]

2. Since the filing of the reply comments, the CC Docket No. 80-286 Federal-State Joint Board (Joint Board) considering the separations of mixed-use special access lines has issued its Recommended Decision.[5] The Commission adopted the Joint Board's Recommended Decision on June 29, 1989.[6] Clearly, for purposes of prospective application, this Mixed-Use Decision determines the treatment of mixed-use special access lines.[7] We also find under the present circumstances that the policies underlying the Mixed-Use Decision provide sound guidance for the resolution of the proper rates to apply to the provision of the special access lines NYT provided AT&T for the Lottery network from the date the two interstate private lines were installed until the new rules become effective. Therefore, we conclude, based on the record before us, that for the period in question, NYT should charge intrastate tariff rates for the mixed-use special access facilities it provided for use in the Lottery network.

II. BACKGROUND

A. The Lottery Network

3. The Lottery operates a communications network utilizing approximately 4920 sales agents located throughout New York.[8] NYT states that the Lottery sales agent terminals are connected via voice grade local channels to NYT central offices where, in the typical situation, thirteen sales agent channels feed

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(Southwestern); Maine Public Advocate and the Maine Public Utilities Commission (Maine); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West); the Lottery; AT&T; Telecommunications Committee of the American Petroleum Institute (API); and the California Bankers Clearing House Association, Mastercard International, Inc., the New York Clearing House Association, and VISA USA, Inc. (collectively the Financial Services Providers (FSPs)).

[4] Reply comments were filed by NYT, California Public Utilities Commission (California PUC), Pacific, GTE Service Corporation (GTE), AT&T, Utilities Telecommunications Council (UTC), and the Ad Hoc Telecommunications Users Committee (Ad Hoc).

[5] MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 1352 (1989) (Recommended Decision).

[6] MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989) (Mixed-Use Decision).

[7] The Mixed-Use Decision established January 28, 1990, as the effective date for those separation rule amendments.

[8] The number of agents is denominated differently in various places in the record. NYT's Comments state the number to be 4920 agents, and we use that number herein.

into three bridges for connection to a single voice grade local channel, described as a "backbone" circuit. These backbone circuits, of which there are approximately 400, typically carry transmissions from the three bridges to an AT&T central office. AT&T typically transmits the signals it receives from NYT to the Lottery's two in-state computers in Clifton Park and Saugerties[9] via multiplexers and high capacity T1.5 interoffice channels. Each of the central computers is operated by an independent vendor and is connected to its vendor's headquarters via single-channel voice grade physically interstate circuits.[10] Each of the interstate circuits can be manually patched to any one of the backbone circuits entering the in-state computers, bypassing the computer and enabling access of up to thirteen sales agent terminals at a time.[11]

4. The Lottery and AT&T explain that the network configuration serves, or in the future may serve, a number of functions. These include: (a) down-line loading of software through direct patching of the interstate lines and out-of-state computers to individual agent terminals for transferring new terminal applications, testing the terminals, and correcting terminal software problems; (b) monitoring the performance of operational programs in both the central computer and agent terminals to identify problems that require corrective action; (c) modifying central system programs to handle large volumes of sales efficiently; (d) transferring new programs to the central systems as needed to rectify operator or program errors; (e) use of vendors' out-of-state facilities as a backup in the event an intrastate facility is destroyed or placed out of use; (f) out-of-state vendor access to agent or system data stored in the central computer through a remote management terminal; and (g) the analysis of transmissions between agents and the central system through a bridge onto the backbone circuit to observe on-line transmissions.[12]

B. The Petition for Declaratory Ruling

5. NYT requests that we declare that intrastate tariffed rates are

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9 The Lottery uses a two computer system to achieve additional reliability and backup capability.

10 One circuit, installed on April 1, 1987, connects the Clifton Park computer to Control Data Corporation's (CDC) offices in Hackensack, New Jersey. The other, installed on March 2, 1987, connects the Saugerties computer to GTECH Corporation's (GTECH) offices in Warwick, Rhode Island. Prior to the installation of the two interstate lines, the Lottery used CDC to operate and manage a system through which all Lottery sales agents registered their sales of Lottery tickets in a single central computer over a network in which all telecommunication facilities were located within New York state, and were provided at intrastate rates.

11 See NYT Comments at 4; Lottery Comments at Enclosure 1.

12 Lottery Comments at 6-8; AT&T Comments at 5-6.

applicable to the mixed-use special access facilities of the Lottery network.[13] NYT first argues that the "contamination doctrine" does not, or should not, apply when the interstate component of an otherwise intrastate private network will perform an ancillary function -- i.e., testing and administration -- that is separable from and incidental to the intrastate network. The term "contamination doctrine" has been used to describe the view that any private line that is used to transmit any interstate communications is jurisdictionally interstate. Under these circumstances, NYT submits, no federal policy would be impaired by continued state regulation.[14]

6. NYT also argues that we are precluded from invoking the contamination doctrine in this situation under the United States Supreme Court's decision in Louisiana.[15] The intrastate Lottery network, according to NYT, is separable from the two interstate lines, and any interstate testing on the physically intrastate Lottery network is separate, incidental, and ancillary to the basic intrastate communications on the network.[16] Thus, NYT contends that, consistent with Louisiana, the interstate testing activity at issue here should be considered de minimus and separable, and should not serve as the basis for federal jurisdiction over the intrastate network.

7. NYT contends that neither the planned overall design of the Lottery network nor the incidental interstate testing of in-state terminals requires the assertion of preemptive federal rate regulation of intrastate circuits. NYT argues that we should exercise our discretion and refrain from exerting our jurisdiction in this case because continued state rate regulation of the physically intrastate Lottery network will not conflict with any Commission rules or our jurisdiction over "bona fide" interstate communications.

C. The New York PSC Proceeding

8. Almost immediately after NYT filed its petition, the NYPSC initiated

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13 All parties agree that the two physically interstate circuits themselves are subject to federal jurisdiction and interstate tariffs.

14 NYT initially claimed that the addition of the two interstate lines to the otherwise intrastate Lottery network was a "sham" plainly designed to transfer jurisdiction from intrastate to interstate by invoking the contamination doctrine, and thus allow the Lottery to obtain service from NYT's interstate special access tariffs. NYT withdrew this argument in its later comments. See NYT Comments at 3 n. 5.

15 Louisiana Public Service Comm'n v. FCC, 106 S. Ct. 1890 (1986).

16 NYT Petition at 6-8. NYT asserts that it is possible to separate the interstate and intrastate traffic over the network, and that, even if a precise measurement cannot be made, the different uses can be recognized and as practical a separation as possible can, and should, be fashioned.

a proceeding for a formal review of the rates to be charged the Lottery.[17] After written submissions by the parties and an evidentiary hearing, the NYPSC Administrative Law Judge (ALJ) issued a Recommended Decision on November 30, 1987 (ALJ Order). That order concluded that (1) the vast majority of the communications on the special access facilities provided by NYT to the Lottery were, or would be, intrastate communications; (2) the interstate and intrastate communications could be separated; (3) that the contamination doctrine was inapplicable on the facts presented; and (4) that interstate rates, therefore, should not be applied to the entire Lottery private network.

9. On January 14, 1988, the NYPSC issued Opinion No. 88-1 in which it adopted the ALJ's recommendation. The Opinion interpreted Louisiana as prohibiting preemptive federal rate regulation of intrastate communications whenever it is possible to separate the interstate and intrastate communications and to apply different rates. In view of these conclusions, the NYPSC Opinion directed NYT to "charge intrastate rates for the intrastate portion of the service provided to the Lottery over physically intrastate private line circuits, i.e., those that originate and terminate in New York state."[18] The NYPSC Opinion concluded, however, that the intrastate rates are not to apply to the interstate portion of the service.

III. POSITIONS OF THE PARTIES

A. Parties Supporting the Petition

10. Eight parties filed comments supporting NYT's petition.[19] Those parties generally support NYT, and urge the Commission to conclude that interstate special access rates are not applicable to the mixed-use special access lines provided for use in the Lottery network. Several parties suggest a ruling on the NYT petition should await the recommendation of the Joint Board addressing the mixed-use special access lines separations issue.[20] Pacific and NYT assert that pending a Joint Board recommendation, we should defer to state tariff regulation of special access lines with predominantly intrastate traffic. GTE states that the public would be better served by deference here, leaving the physically intrastate Lottery network to state regulation.[21]

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17 Proceeding on Motion of the Commission as to the Rates, Charges and Tariffs Applicable to Telephone Service Provided by New York Telephone Company to the New York State Lottery, New York Public Service Commission Case No. 29673, Order to Show Cause, Aug. 19, 1987.

18 NYPSC Opinion 81 at 22.

19 Commenters supporting the petition were NYT, California PUC, NYDPS, Pacific, Southwestern, Maine, GTE, and US West.

20 See, e.g., Pacific Comments at 8; API Comments at 12.

21 GTE suggests that the Communications Act should not be read to require the

11. Several commenters submit that interstate rates should not apply since only a de minimis amount of interstate communications is involved. The NYDPS underscores the minimal interstate use expected on the Lottery network and requests the Commission to acknowledge that applying interstate rates to the entire Lottery network would constitute an impermissible preemption of state regulation over intrastate communications. NYT contends that the Lottery's only basis for claiming contamination is the possibility of direct patching of the interstate lines to the sales agent terminals; yet, it claims that the record supports the conclusion that any patching will be very infrequent. Such interstate communications, according to NYT, cannot serve to contaminate the 4920 intrastate circuits connecting the computers in New York to the sales agent terminals. NYT explains that, based on the parameters specified by the Lottery itself, at most 2/400ths of the circuits to sales agent terminals could be used for interstate communications at any time via direct connection of out-of-state test lines to sales agent terminal backbone circuits. NYT contends that this is an extremely high estimate since the NYPSC record showed that most of the time the interstate lines will be connected to the central computers rather than the sales agent terminals.[22] NYT submits that the NYPSC record indicates that: (1) the control testing of software changes to agent terminals will involve only one backbone circuit at a time (the software itself is downloaded to the agent terminals from the in- state computer after some initial testing); (2) much of the testing capability is redundant with in-state capabilities; (3) agent terminals will not be repaired over interstate lines (most terminal problems are hardware related and have nothing to do with the software); and (4) controlled testing of software takes place only once or twice a month. Additionally, NYT suggests that connections to the sales agent terminals are inconsistent with accepting wagers and, thus, will be minimized.[23]

12. Several commenters contend that the interstate communications transitting the Lottery network are ancillary to the primary function of the network which has no bona fide need for interstate communications and, as such, are insufficient to invoke the contamination doctrine.[24] US West argues that the purpose of the Lottery network is to connect Lottery sales agents, all located in New

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Commission to exert jurisdiction whenever interstate traffic is involved, noting that such a reading would conflict with the principles of federalism recognized in Louisiana. Moreover, GTE claims, the Commission has never articulated a standard pursuant to which "any whisper" of interstate communication requires application of the contamination doctrine.

22 NYT Comments at 10-11; ALJ Order at 31. See also Rebuttal Testimony of William G. McGruther, MYPSC Case No. 29673, pages 8-10.

23 NYT Comments at 12.

24 The California PUC and Maine go beyond the ancillary argument and assert, in effect, that the addition of the two interstate lines to the Lottery network is a "sham," designed solely to obtain service under an interstate tariff. If the Commission extends the contamination doctrine to such situations, the California PUC warns, the states will be unable to implement an efficient rate design policy.

York, to two computers to track Lottery ticket sales, while the purpose of the interstate communications is to confirm the proper operation of the intrastate private lines used to carry data concerning Lottery sales throughout the state.[25] Southwestern, US West, and GTE urge the Commission not to invoke the contamination doctrine because the Lottery network has no bona fide need for the interstate communications, and without such a need the incidental presence of two interstate lines should not reclassify an otherwise intrastate network. Finally, several parties argue that the Commission should defer to state regulation of the intrastate network since federal interests and policies would not be threatened by so doing.[26] These parties assert that all of the interests are related to New York: its residents make the wagers, the Lottery receives the money, and the Lottery exists by virtue of the New York State legislature. NYT also asserts that there is no impact on interstate communications, no frustration of national communications policy, and no threat of inconsistent state regulation of technical, market entry, or network connection standards.

13. Pacific joins NYT in arguing that Louisiana precludes the Commission from determining the rates for the intrastate traffic over the Lottery network since, in its view, a reasonable means of making a jurisdictional allocation exists.[27] NYT claims that the NYPSC proceeding demonstrated that the amount of interstate communications on the Lottery network can be determined with a high degree of reliability since interstate traffic occurs only when a direct patch is in place and indicates that the Lottery has said it will keep a record of all manual patched connections of the two interstate lines. Estimates of state and interstate usage can also be made based on the network configuration, according to NYT.[28] The NYDPS requests that the Commission devise a fair allocation between the interstate and intrastate jurisdictions for these facts.

B. Parties Opposing the Petition

14. Six parties filed comments opposing the NYT petition.[29] AT&T and the Lottery contend that the interstate communications will be neither de minimis nor ancillary and will be used for much more than simply routine administrative tasks. AT&T asserts that the interstate transmission capabilities are a key component of the Lottery network and will be used for many necessary functions, including testing, software repair and programming, and monitoring of operational programs and seller volumes. AT&T disputes NYT's allegation that because two of the four hundred Lottery backbone circuits could be directly connected to

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25 US West Comments at 4-5.

26 See, e.g., US West Comments at 4.

27 See NYT Comments at 13-14; Pacific Comments at 6-7.

28 See also, Maine Comments at 5.

29 Commenters opposing the petition were the Lottery, AT&T, API, the Financial Services Providers, UTC, and Ad Hoc.

interstate lines at any time, 2/400 of the network's usage may be considered interstate. The problem with this argument, AT&T contends, is that it erroneously assumes that usage on the interstate and intrastate circuits is always the same, an assumption AT&T says is contradicted by the record. Finally, AT&T and the Lottery assert that the Lottery has a bona fide need for the interstate communications that will occur on the network.[30]

15. Several commenters contend that the relative use and function of the interstate communications are irrelevant to application of the contamination doctrine since private lines carrying both interstate and intrastate traffic are inseverable and are jurisdictionally interstate for rate regulation purposes.[31] Several parties state that it is the nature of the communications that determines jurisdiction, not the configuration of the network. AT&T, therefore, argues that it would be inappropriate to apply a ratio of the physically interstate lines to the number of physically intrastate lines to determine the jurisdictional allocation. AT&T contends that, under well-established precedent, the mixed-use facilities in question are jurisdictionally interstate because the mixed-use facilities are used for interstate communications.[32] Several parties argue that while the jurisdictional nature of mixed-use special access lines is being considered by the Joint Board, mixed-use special access lines must be provided at interstate rates.[33]

16. Several commenters assert that separation of jurisdictionally-mixed communications over private lines is neither feasible nor practical. Moreover, they submit that because of the flat rate pricing of private lines, a relative use allocation will not elicit investment and cost allocations that accurately match the costs and the revenues.[34] AT&T asserts that NYT and the NYPSC have conceded that precise measurement of the traffic is not possible. Furthermore, many parties opposing the NYT petition note that additional equipment would have to be purchased to perform relative use measurements, thereby increasing the cost and possibly degrading service quality. FSP posits that it is the responsibility of the carrier, not the customer, to conduct any measurements

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30 AT&T states that the capability that exists at the headquarters of CDC and GTESC could not be duplicated at reasonable cost in New York state since none of the companies that bid to provide the computer portion of the Lottery network had software processing headquarters in New York state.

31 See, e.g., FSP Comments at 5-9; UTC Reply Comments at 6-7; Ad Hoc Reply Comments at 5-9; AT&T Reply Comments at 6-9.

32 AT&T cites American Tel. and Tel., 103 FCC 2d 69 (1985), appeal dismissed sub nom. Pacific Bell v. FCC, No. 85-1599 (D.C. Cir. June 13, 1986), vacated as moot, 1 FCC Rcd 362 (1986), and the Hecht Reconsideration Order.

33 See, e.g., API Comments at 8.

34 Such a ruling, according to AT&T, would destroy the essential nature of private line service, which is to make available a dedicated circuit at a fixed charge, and would eliminate many of the economies that generally permit private lines to be offered more cheaply than switched services.

required to determine jurisdiction, and that is not possible here.

17. A number of parties opposing the NYT petition contend that the contamination theory is unaffected by Louisiana. AT&T and Ad Hoc argue that Louisiana confirms the Commission's exclusive jurisdiction over mixed-use facilities. FSP contends that the ALJ in the NYPSC proceeding reversed the analysis required by Louisiana by assuming that because interstate and intrastate traffic are carried over the Lottery network, it must be subject to dual jurisdiction, and the only issue was the appropriate method of allocation. However, FSP claims, under the contamination doctrine and Louisiana, it is the ability (or lack thereof) to measure the interstate communications over a mixed-use facility that determines the jurisdictional classification of the network. Several parties submit that assertion of interstate jurisdiction over a mixed-use private network such as that involved here is fully consistent with the Act, which evidences a clear Congressional intent to preempt state regulation of interstate communications.[35] Because of this statutory preemption, the Commission, according to UTC, is not required to demonstrate that the imposition of intrastate rates upon interstate commerce frustrates or imposes a burden upon interstate commerce in order to exercise exclusive jurisdiction; it is sufficient that some of the communications flowing over mixed-use lines are interstate.

18. While vigorously defending the contamination doctrine in theory, FSP reasons that certain limitations on the doctrine might be appropriate. FSP suggests that the Commission may elect not to invoke the contamination doctrine if the transmission of interstate traffic is a "sham" to manipulate jurisdiction or if the interstate communications are "incidental" to the operation of an intrastate private network.[36] Other commenters who oppose the NYT petition, however, oppose the various proposals, including that of FSP, to engraft a "sham," de minimis, ancillary, or incidental use exception(s) onto the contamination doctrine. AT&T asserts that a de minimis or ancillary/incidental exception to the contamination doctrine could lead to rate discrimination among users of interstate services in violation of section 202(a) of the Act.[37] AT&T, API, and Ad Hoc also submit that a de minimus or ancillary exception to the contamination doctrine will result in burdensome fact-specific cases in which reasonable minds may disagree about the position of the jurisdictional line, and, in any event, would be inappropriate in this case. Additionally, they assert that an exception that depends upon the type of information being transmitted would be impractical.

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35 See, e.g., Ad Hoc Reply Comments at 9 n. 15.

36 The "incidental" nature of the communications, FSP argues, is a function of the purpose of a private network, not the relative volume of interstate traffic, and thus would not require the measurement or allocation of traffic on mixed-use special access lines if applied to the contamination doctrine.

37 AT&T also disputes the statutory basis for an "incidental" exception to the contamination doctrine, asserting that Section 203 requires interstate service to be provided pursuant to interstate tariffs.

IV. DISCUSSION

19. The NYT petition presents the question of whether these mixed-use special access facilities should be provided from an interstate tariff, or an intrastate tariff. As discussed below, under the circumstances of this record, we believe that the principles underlying the recent resolution of the prospective treatment of mixed-use special access lines can assist us in deciding the questions presented here.

20. The Joint Board recently returned its Recommended Decision, and the Commission has adopted its recommendation. Pursuant to the new rules, mixed-use special access lines carrying de minimus amounts of interstate traffic will be directly assigned to the intrastate jurisdiction and thus will be charged rates contained in intrastate tariffs. Under the rules, interstate traffic on a mixed-use special access line is deemed to be de minimus for separations purposes when it amounts to ten percent or less of the total traffic on the line.[38]

21. Upon their effectiveness, the mixed-use special access rules adopted in the Mixed-Use Decision will govern the jurisdictional assignment of the mixed-use special access facilities in the Lottery network. While it appears from the present record that the interstate usage on the mixed-use special access lines in the Lottery network is de minimus under the new rules, the parties to this proceeding have not addressed the application of the new rules to the Lottery network. Moreover, the Lottery may decide to restructure its network in some way that is not reflected in this record. Therefore, we do not address the prospective application of the new rule beyond noting that it will apply. The remaining question presented by the NYT petition is that of the appropriate jurisdictional tariffing of the mixed-use special access lines in the Lottery network from the date the first physically interstate line was installed until the date the mixed-use special access rules become effective.[39]

22. The Joint Board and the Commission considered legal and policy issues similar to those raised in the comments in this proceeding in adopting the new rules. The decision to employ direct intrastate assignment of mixed-use special access lines carrying de minimus amounts of interstate traffic derived from significant concerns about economic efficiency, the proper recognition of state and federal regulatory interests, and administrative simplicity.[40] The Commission noted that direct interstate assignment of mixed-use special access lines carrying any interstate traffic would undermine state regulatory authority because the addition of even trivial amounts of interstate traffic results in a change in

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38 Mixed-Use Decision, 4 FCC Rcd at 5660.

39 The special access facilities associated with the physically interstate private lines, which carry only interstate traffic, are covered by interstate special access tariffs.

40 Mixed-Use Decision, 4 FCC Rcd at 5660, adopting the Recommended Decision, 4 FCC Rcd at 1355-58.

regulatory jurisdiction.[41] We believe that classifying any mixed-use line that carries any interstate traffic as an interstate line for billing purposes under the facts before us would lead to precisely the anomalous type of result we have sought to avoid with the new rules.[42] We find that the reasoning of the Mixed-Use Decision can provide us with guidance for resolving the question of the appropriate rates from early 1987, when the physically interstate lines were installed, until the recently adopted separations rules relating to mixed-use special access lines become effective. A variety of factors lead us to this conclusion.

23. At the outset, we note that a precise measurement of the relative interstate and intrastate use of the mixed-use special access lines in the Lottery network is not possible for past periods. The logs kept by the Lottery of the direct patches of the interstate lines to the backbone circuits measured only interstate traffic, not the intrastate traffic. Therefore, an actual relative use measurement is not possible. However, based on the data in the record relating to the system design and function, the amount of interstate traffic being carried over the mixed-use special access lines in the Lottery network appears to be very limited--far less than the de minimus level adopted by the Commission. The fact that the Lottery network has only two physically interstate private lines clearly limits the amount of interstate communications that can occur on the Lottery network when compared to the 400 backbone circuits in the Lottery network and its operating arrangements. The physically interstate lines represent only 0.5% of the intrastate lines. AT&T notes that using line counts as a surrogate for usage incorrectly assumes that equal levels of usage exist on all lines at all times.[43] While AT&T is theoretically correct, the record only identifies several capabilities that the network possesses that could enable the out-of-state computers to access the sales agent terminals on the physically intrastate Lottery lines. The record does not indicate the amount of time that such usage will involve, but it does indicate that most of the usage on the two physically interstate lines will be between the two in-state computers and the respective out-of-state computers located at the vendor headquarters and thus that traffic will not be carried over any mixed-use special access line.[44] Thus, it appears that the mixed-use special access lines in the Lottery network did not carry more than an insignificant amount of interstate traffic during the period in question.[45]

24. Additionally, the totality of the circumstances in this case does not warrant the application of interstate special access rates. Rather, as several parties have observed, the interests in question relate principally to New York.

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41 Mixed-Use Decision, 4 FCC Rcd at 5660, adopting the Recommended Decision, 4 FCC Rcd at 1357.

42 The Commission in fact specifically mentioned the NYT petition in adopting the new mixed-use separations rules.

43 See supra para. 13.

44 See supra para. 11.

45 The NYPSC, as we noted earlier, reached a similar factual conclusion.

In particular, we note that lottery sales may only be made in New York, and thus, sales agent terminals can only be located within New York. The Lottery network was operated as an intrastate network and was charged intrastate tariff rates prior to its reconfiguration in 1987. Moreover, NYT has been charging AT&T intrastate tariff rates for the mixed-use special access facilities since 1987. Additionally, assuming no network alterations, it appears from the record that the interstate usage on the mixed-use special access lines in the Lottery network will meet the de minimus criteria of the new separations rules and that NYT will be required to charge intrastate rates for the mixed-use special access lines in question when those rules become effective. Under these circumstances, applying interstate rates for the interim period, as urged by several parties, would be unduly disruptive.[46] Therefore, for the foregoing reasons, we conclude that for the period in question, AT&T should be charged intrastate tariff rates for the mixed-use special access facilities provided it by NYT for use in the Lottery network.[47]

25. Furthermore, contrary to AT&T's assertion, the application of the intrastate rates to the negligible interstate traffic involved in the Lottery network will not result in any unreasonable discrimination. The decision herein will result, for an interim period, in assessing intrastate rates for facilities carrying a small amount of interstate traffic in addition to a much larger volume of intrastate traffic. Those facilities carried largely intrastate traffic. Other interstate traffic will be carried over special access facilities tariffed in the interstate jurisdiction. Assuming for this analysis that the services involved are "like" services, the fact that identical rates will not apply to all facilities carrying interstate special access traffic is not per se unjust and unreasonable under Section 202(a) of the Act. This is especially true when the amount of interstate traffic is de minimus, as appears to be the case here. Given the overwhelming state interest in the Lottery network, the policies underlying the recent Commission decision concerning the separations treatment of mixed-use special access lines, and the circumstances in this proceeding, we do not believe that it would be desirable to apply interstate rates to all the mixed-use special access lines in the Lottery network. This would allow the carriage of a de minimus amount of interstate traffic to outweigh all of the other considerations which militate in favor of state tariffing of these facilities in the present case. Thus, based on the record, we do not believe that application of the intrastate rates to the mixed-use special access facilities in the Lottery network for the interim period is unjust or unreasonable.[48]

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46 The principal cases cited by AT&T as providing precedent for the contamination doctrine have become moot, and the opinions have been vacated by this Commission.

47 We need not reach the question raised by FSP that the interstate traffic in question is "incidental" to intrastate communications and thus, under Section 152(b), is part of a communication service reserved for state regulation. We also do not reach the contention that the traffic is "sham."

48 AT&T also argues, as noted in footnote 35, supra, that permitting NYT to charge intrastate rates for the mixed-use special access lines provided to the Lottery would violate the Act's requirement that carriers charge interstate rates for

26. ACCORDINGLY, IT IS ORDERED, that the Petition for Declaratory Ruling filed by the New York Telephone Company IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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interstate or foreign wire or radio communication, 47 U.S.C. § 203(a). We do not construe Section 203(a) to require that interstate rates be applied to facilities with de minimus interstate usage.

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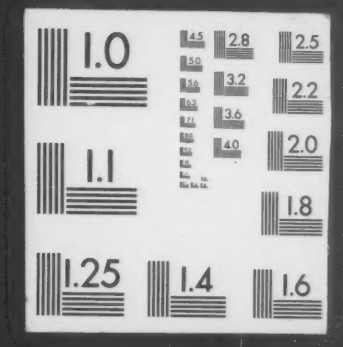
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